

United States
Circuit Court of Appeals
For the Ninth Circuit, 12

ALMA I. WAGNER, Executrix of the Estate of
Robert G. Wagner, Deceased,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Upon Petition to Review an Order of the United States
Board of Tax Appeals

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PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit

ALMA I. WAGNER, Executrix of the Estate of
Robert G. Wagner, Deceased,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES.

JOHN B. MILLIKEN, Esq.,
GEO. H. KOSTER, Esq.,
L. A. LUCE, Esq.,
For Petitioner.

R. W. WILSON, Esq.,
C. GWINN, Esq.,
For Respondent.

United States Board of Tax Appeals.

Docket No. 32,981

ALMA I. WAGNER, Executrix,
ROBERT G. WAGNER, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES.

1927

Dec. 15—Petition received and filed. Taxpayer notified. (Fee paid.)

Dec. 16—Copy of petition served on General Counsel.

1928

Feb. 14—Answer filed by General Counsel.

Mar. 2—Copy of answer served on taxpayer—Circuit Calendar.

1930

Jan. 16—Notice of appearance of John B. Milliken as counsel for taxpayer filed.

1930

Mar. 18—Hearing set May 16, 1930,—Los Angeles, California.

May 16—Hearing had before Stephen J. McMahon on merits. Submitted. Briefs due Sept. 1, 1930.

July 21—Transcript of hearing of May 16, 1930, filed.

Aug. 7—Brief filed by General Counsel.

Sept. 2—Brief filed by taxpayer.

1931

June 26—Findings of fact and opinion rendered—Stephen J. McMahon, Division 16. Judgment will be entered for the respondent.

June 29—Decision entered—Chas. P. Smith, Division 5.

Dec. 15—Supersedeas bond in the amount of \$26,760.88 approved and filed.

Dec. 16—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

Dec. 16—Proof of service filed.

1932

Feb. 12—Motion for extension to 4/16/32 to prepare and transmit record filed by taxpayer.

Feb. 12—Statement of evidence lodged.

Feb. 12—Notice of lodgment of statement of evidence, proof of service of praecipe with hearing set 2/24/32 filed. [1]*

*Page numbering appearing at the foot of page of original certified Transcript of Record.

1932

- Feb. 12—Praecipe filed.
- Feb. 15—Objections to statement of evidence filed by General Counsel.
- Feb. 15—Order enlarging time to April 16, 1932, for preparation of evidence and delivery of record entered.
- Feb. 24—Hearing had before Mr. McMahon on approval of statement of evidence—C. A. V.
- Mar. 2—Transcript of hearing of Feb. 24, 1932, filed.
- Apr. 8—Motion for extension to 6/16/32 to prepare and transmit record filed by taxpayer.
- Apr. 9—Order enlarging time to June 16, 1932, for preparation of evidence and delivery of record entered.
- Apr. 12—Order that petitioner amend statement of evidence and overruling certain objections of respondent entered.
- June 13—Motion for extension to Aug. 16, 1932, to prepare and transmit record filed by taxpayer.
- June 13—Order enlarging time to Aug. 16, 1932 for preparation of evidence and delivery of record entered.
- July 18—Statement of evidence lodged.
- July 27—Statement of evidence approved and ordered filed. [2]

United States Board of Tax Appeals.

ALMA I. WAGNER, Executrix,
ROBERT G. WAGNER, Deceased,
830 South Olive Street,
Los Angeles, California,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 32,981

PETITION.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:E:AjJWT-5329-60-D, dated October 19, 1927, and as a basis of his proceedings alleges as follows:

I. The petitioner is an individual with office at 830 South Olive Street, Los Angeles, California.

II. The notice of deficiency, a copy of which is attached and marked Exhibit "A," was mailed to the petitioner on October 19, 1927.

III. The taxes in controversy are income taxes for the calendar year 1920 for \$13,380.44.

IV. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) That in determining the profit realized from the sale of petitioner's interest in a certain patented inven- [3] tion sold to the Wagner-Woodruff Corporation in the year 1920, the Commissioner erred in not allowing any amount whatsoever as representing the March 1, 1913, value of such invention.

V. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(1) During the year 1912 petitioner and Ernest J. Schweitzer invented an indirect lighting fixture which was a decided improvement upon all other indirect lighting fixtures and embodied a concave or convex reflecting surface instead of a flat reflecting surface, as was used on all other indirect lighting fixtures. This fixture was not an entirely new device but was an improvement upon a fixture which had previously been placed upon the market. This lighting fixture was manufactured and placed upon the market for actual use in December, 1912, thus constituting a complete reduction to actual practice of said invention and demonstrating by its use its commercial feasibility. The invention was put into actual commercial quantity production in January, 1913, and orders for the actual commercial sale of such fixtures were received as early as December, 1912. After commencing the manufacture and commercial sale of the lighting fixtures, numerous orders were received and the fixtures manufactured and installed during January, 1913, and the business of manufacturing, selling and installing the same, continued to the present day.

The lighting fixtures embodying and containing this invention are manufactured under the trademark and tradename of "Briterlite."

At the time this invention was conceived and the [4] first lighting fixture embodying such invention was made, which was in December, 1912, there was a market demand existing for this character of lighting fixture. Sometime prior to this date the Luminous Unit Company of St. Louis, Missouri, had been exploiting a semi-indirect lighting fixture of this same character, and the demand for that class of fixture was sufficiently great at that time as to have become substantially the most popular electric fixture on the market. Petitioner conceived and completed this invention, which was in effect an improvement on the old type of indirect lighting fixture, to supply that demand so existent at this time. The fixture was placed on the market particularly in Los Angeles, California, and in the southern part of California.

The demand for an indirect lighting fixture came into existence with the advent of the Tungsten light, which was many years prior to the conception of this invention. This demand for indirect lighting was further increased by the perfection of the Nitrogen lamp, a lamp which was too bright to use without an indirect fixture, and which came out during the early part of the year 1912. Petitioner, in December, 1912, and especially at the basic date—March 1, 1913, had in his possession a very valuable asset in the nature of a protected invention for

a successful indirect lighting fixture, which fixture had been tried and tested on the market, especially in southern California, and had proven itself a very valuable fixture. [5]

Application for patent upon the "Briterlite" invention was not immediately made, for the reason that under the United States Patent Laws after an inventor has completed his invention he may manufacture and sell devices embodying and containing the same for any period of time not greater than two years, and still reserve his absolute right to a patent. Application for a patent on this invention was filed in December, 1914, thus taking full advantage of the rights under the Patent Laws and extending the monopoly of said invention practically three years. The patent on this "Briterlite" invention was granted September 21, 1915.

This invention was sold to the Wagner-Woodruff Company during the year 1920 for \$85,000.00, petitioner's interest in said invention being one-half, or \$42,500.00. The March 1, 1913, value being in excess of the amount received from the sale in 1920, no profit was realized by petitioner on this transaction.

VI. The petitioner prays for relief from the deficiency asserted by the respondent on the following and each of the following particulars:

(a) That he should be allowed a value as of March 1, 1913, on the protected invention sold to the Wagner-Woodruff Company, and that the value

of this invention as of this date was in excess of the selling price in 1920.

WHEREFORE, petitioner prays that this Board may hear and re-determine the deficiency herein alleged.

ALMA I. WAGNER,
Executrix. [6]

State of California,
County of Los Angeles.—ss.

Alma I. Wagner, Executrix, Robert G. Wagner, Deceased, hereby duly sworn, says that she is the petitioner above named; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts she believes to be true.

ALMA I. WAGNER.

Subscribed and sworn to before me this 10th day of December, 1927.

[Seal] MARGUERITE LE SAGE,
Notary Public in and for the County of Los Angeles, State of California.

CLAUDE I. PARKER, Attorney,
Per FRANK G. BUTTS. [7]

EXHIBIT "A."

Form NP-2

Treasury Department,
Washington.

Office of
Commissioner of Internal Revenue.

IT:E:Aj

JWT-5329-60D

Mrs. Alma I. Wagner, Executrix,
Mr. Robert G. Wagner, Deceased,
830 South Olive Street,
Los Angeles, California.

Madam:

An examination of your income tax returns and records has been made for the years 1920 and 1921, resulting in additional taxes as set forth in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assess-

ment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:Aj-JWT-5329-60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. B. ALLEN,
Deputy Commissioner.

Inclosures:

Statement
Form A.

Form 7861—Revised Mar. 1926. [8]

Statement.

IT:E:Aj

JWT-5329-60D

In re: Robert G. Wagner,
830 South Olive Street,
Los Angeles, California.

Calendar Year 1920

Net income returned			\$26,915.17
Add: Profit on sale of patents	\$42,500.00		
Disallowance of taxes,			
Amount returned	\$1,559.83		
Amount corrected	129.74	1,430.09	43,930.09
Deduct: Rents reduced			\$70,845.26
Amount returned	\$1,200.00		
Amount corrected	696.34		503.66
Net income, revised			\$70,341.60

Computation of Tax

Net income	\$70,341.60	
Less: Exemption	2,200.00	
Balance subject to normal tax	\$68,141.60	
Normal tax, 4% on \$4,000.00		\$ 160.00
Normal tax, 8% on \$64,141.60		5,131.33
Surtax on \$70,341.60		11,326.14
Amount of tax assessable		\$16,617.47
Less: Previous assessment		
Account #305900		3,237.03
Additional tax		\$13,380.44

Calendar Year 1921

Net income, returned		\$19,674.45
Add: Rents received:		
Amount returned (loss)	\$ 3,217.79	
Amount corrected	332.52	
	\$3,550.31	
Profit on sale of stock	340.00	3,890.31
		\$23,564.76

Robert G. Wagner.			Statement.
Brought forward			\$23,564.76
Interest disallowed		\$1,200.00	
Taxes disallowed:			
Amount returned	\$1,233.97		
Amount corrected	264.37	969.60	2,169.60
			<hr/>
Net income, corrected			\$25,734.37
	Computation of Tax		
Net income			\$25,734.37
Less:			
Exemption		\$ 2,400.00	
Dividends		400.00	2,800.00
			<hr/>
Balance subject to normal tax			\$22,934.36
Normal tax, 4% on \$4,000.00			160.00
Normal tax, 8% on \$18,934.36			1,514.75
Surtax on \$25,734.37			1,280.78
			<hr/>
			\$ 2,955.53
Less:			
Previous Assessment			
Account #305157			1,873.92
			<hr/>
Additional Tax			\$ 1,081.61
	Summary		
Years		Additional Tax	
1920—Waiver		\$13,380.44	
1921—Waiver		1,081.61	
		<hr/>	
		\$14,462.05	

The General Counsel for the Bureau of Internal Revenue, after careful consideration of the evidence submitted, holds that the taxpayer's income should be computed upon the basis that there was received \$25,000.00 for a half interest in the basic patent and \$17,000.00 for a half interest in the design patents.

Inasmuch as the taxpayer is now deceased, the penalty proposed in Bureau letter dated October 30, 1926, has been removed.

[Endorsed]: Filed Dec. 15, 1927. [10]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. Admits the allegations of paragraph I of the petition.

II. Admits the allegations of paragraph II of the petition.

III. Admits that the taxes in controversy are deficiency income taxes for the calendar year 1920 amounting to \$13,380.44.

IV. Denies that respondent erred in any of the respects as alleged in paragraph IV of the petition.

V. Denies the allegations of paragraph V of the petition.

Denies generally and specifically each and every allegation not hereinbefore admitted, qualified, or denied.

WHEREFORE, it is prayed that the appeal be denied.

C. M. CHAREST,

General Counsel,

Bureau of Internal Revenue.

LEROY L. HIGHT,

Special Attorney,

Bureau of Internal Revenue,

Of Counsel.

[Endorsed]: Filed Feb. 14, 1928. [11]

[Title of Court and Cause.]

A true copy: Teste.

B. D. GAMBLE, Clerk.

Docket No. 32,981 Promulgated June 26, 1931.

Upon the evidence *held* that petitioner has not overcome the presumption of the correctness of the respondent's determination that an invention, patent for which had not been applied for on March 1, 1913, had no fair market price or value at that date.

George H. Koster, Esq., and John B. Milliken, Esq., for the petitioner.

R. W. Wilson, Esq., for the respondent.

FINDINGS OF FACT AND OPINION.

This is a proceeding for the redetermination of a deficiency in income tax for the year 1920 in the amount of \$13,380.44. The only error alleged is that in determining the profit realized from the sale of Wagner's interest in a certain patented invention to the Wagner-Woodruff Corporation in 1920 the respondent refused to allow any amount whatsoever as representing the March 1, 1913, value of such invention, which date was previous to the filing of an application for a patent and the granting thereof.

FINDINGS OF FACT.

The petition is filed in the name of Alma I. Wagner, as executrix of the Estate of Robert G.

Wagner, deceased. Robert G. Wagner is hereinafter referred to as the decedent.

The decedent was an individual with office at 830 South Olive Street, Los Angeles, California. [12]

In 1911, the decedent and one Ernest J. Schweitzer were the owners of the stock of the Wagner-Woodruff Corporation, a corporation engaged in the business of manufacturing and selling electric lighting fixtures in Los Angeles. About that time, due to the fact that a new type of gas light was brought out which was very bright, several kinds of indirect electric lighting fixtures appeared on the market. Among these were the Brascolite, manufactured by the St. Louis Brass Works, and the Phoenix Light. Most of the commercial houses, General Electric, Edison Co., and others were putting in these indirect lighting fixtures. In 1912 and 1913, the Brascolite was the most popular one of these types of fixtures and was in great demand. At that time the Brascolite had been installed in a great many commercial buildings in Seattle, Denver, Salt Lake City, Chicago, Minneapolis, Detroit, and the important Eastern cities. This fixture is still in great demand.

This Brascolite fixture was an indirect lighting unit having a translucent globe inverted and a reflecting pan above it.

In 1912, Schweitzer and the decedent, working in the factory of the Wagner-Woodruff Corporation, invented an indirect electric lighting fixture which

they called the Briterlite. This was a lamp mounted in a globe of translucent material and having above it a downwardly reflecting reflector of curved contour so as to diffuse the light downward. These lights were being manufactured and sold to a very limited extent in 1912 and 1913. In January or February, 1913, [13] the decedent and Schweitzer had obtained a contract for the production and installation of a number of "Briterlite."

Schweitzer and the decedent in the latter part of 1912 consulted Frederick S. Lyon, an attorney at law, who, at that time, had been engaged for about 20 years in practicing exclusively in patent, trade mark and copyright matters, and who had represented decedent in a number of patent matters. Lyon caused an examination of the records of the patent office to be made and rendered to Schweitzer and the decedent an opinion or report as to the patentability of the Briterlite invention. He advised Schweitzer and the decedent that the Briterlite did not infringe the original Guth patent which was the patent covering the Brascolite. The Guth patent had been originally in litigation and the original claims were held to a certain limitation. Subsequently, an application was made by the owner of the Guth patent for a reissue or amended patent on the Guth invention and a reissue was granted. The result was that while the Guth patent was sustained generally the rights of the decedent and Schweitzer could not be cut off because they

were intervening rights, the decedent and Schweitzer having invested their money, made their application for patent, and gone into actual manufacture of the Briterlite. Decedent and Schweitzer were thus able to continue in the manufacture and sale of the Briterlite without regard to the fact that the reissue of the Guth patent shut out others who were not licensed. The only fixture in competition with the Brascolite and which did not infringe the Guth patent was the Briterlite, because of the intervening rights of the decedent and Schweitzer. [14]

One of the material differences between the Briterlite and the Brascolite was that the upper reflecting surface of the Brascolite or Guth patent was flat. The original Guth patent was limited to a flat upper reflecting surface and to the patent arrangement of the other reflecting surfaces with relation to it. The Briterlite differed essentially in that it had a curved pan at the top. It was not within the scope of the original Guth patent although the reissued Guth patent did not limit the Guth invention in that same manner. The Briterlite also had three hooks on the bowl and the bowl could be more easily removed than the bowl on the Brascolite. The Briterlite was an improvement over other fixtures of the same type and could be sold readily in competition with them.

An application for patent covering the Briterlite fixture was filed sometime during the year 1914 and

a patent was thereafter granted about September 21, 1915.

The Briterlite was made in about eight different sizes and styles. In 1913, the best seller sold for from \$18 to \$20. In computing the sales list price for the Briterlite the cost of labor and material was taken as a basic cost and 50 per cent of this amount added for overhead. The retail selling price was double that amount.

In 1920 the demand for these indirect lighting fixtures was not as great because a new type of glass had been invented which was thin in texture so as to allow maximum rays of light to pass entirely through the glass. This was very cheap to market. [15]

In 1920 the decedent and Schweitzer sold the patent on the Briterlite fixture to the Wagner-Woodruff Corporation for \$85,000. They each owned a one-half interest in this patent. The respondent determined that the decedent derived an income from this transaction in the amount of \$42,500.

OPINION.

McMAHON: The question here presented is whether the respondent erred in computing the gain in 1920 upon the sale, for \$85,000 of the Briterlite patented invention. Respondent contends that the invention on March 1, 1913, which was prior to the date application for patent upon such invention was filed, and before a patent was issued, had no value.

It is the contention of the petitioner that the invention had a fair market value on that date of at least \$100,000 and that the deficiency should be redetermined. There is no evidence as to the cost of the invention, and therefore, the basis to be used in the determination of gain upon the sale of the asset in question is its fair market price or value at March 1, 1913. Section 202 (a) (1) of the Revenue Act of 1918. See also *Goodrich v. Edwards*, 255 U. S. 527. The petitioner does not contend that a loss was sustained upon the sale.

Petitioner contends that an invention, prior to the time the patent is issued thereon and even prior to the date that an application for a patent is filed, is property capable of being valued, citing, among other cases, *Hershey Manufacturing Co.*, 14 B. T. A. 867; *Hendrie v. Sayles*, 98 U. S. 546; and *Butler v. Ball*, 28 Fed. 754. [16] However, in the view we take of the evidence in this proceeding, we do not deem it necessary to determine whether or not this contention of petitioner is correct.

Even if we assume, for the purpose of argument only, that the Briterlite invention on March 1, 1913, was valuable property, the evidence does not establish its fair market price or value at that time. At March 1, 1913, the decedent and Schweitzer did not have exclusive right to manufacture and sell the Briterlite since no patent had been granted thereon. See *Gayler v. Wilder*, 10 How. 476. Furthermore, from a consideration of all the evidence, we do not

believe that the issuance of a patent upon the Briterlite was assured at March 1, 1913. At that time decedent and Schweitzer had not even filed an application for patent. At that time, there was a patented invention, the Brascolite, which was quite similar to the Briterlite. The Brascolite patent had been in litigation and its limitations had not been clearly defined. There is no evidence whatsoever in the record as to the fair market price or value of the Briterlite invention or the rights of the decedent and Schweitzer therein at March 1, 1913. It follows that the determination of the respondent must be approved.

Judgment will be entered for the respondent. [17]

United States Board of Tax Appeals,
Washington.

Docket No. 32,981.

ALMA I. WAGNER, EXECUTRIX, ESTATE
OF ROBERT G. WAGNER, DECEASED,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated June 26, 1931, it is

ORDERED and DECIDED: That there is a deficiency of \$13,380.44 for the year 1920.

A true copy: Teste.

B. D. GAMBLE, Clerk.

[Seal]

CHARLES P. SMITH,

Member.

Entered Jun 29, 1931. [18]

[Title of Court and Cause.]

PETITION FOR REVIEW TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Alma I. Wagner, executrix of the estate of Robert G. Wagner, deceased, by her attorneys, Claude I. Parker and George H. Koster, and respectfully shows:

I.

The petitioner on review (hereinafter referred to as petitioner) is the duly qualified and now acting executrix of the estate of Robert G. Wagner, deceased, and now resides in Los Angeles, California, as did the decedent during the year 1920. The respondent on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue

of the laws of the United States. The individual income and profits tax return of the decedent for the year 1920, being the taxable year involved herein, was filed with the United States Collector of Internal Revenue for the Sixth District of California, the office of said Collector being [19] located within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

The Commissioner determined a deficiency in income tax for the year 1920 in the amount of \$13,380.44, and on October 19, 1927, in accordance with the provisions of Section 274 of the Revenue Act of 1926, sent to the petitioner by registered mail notice of said deficiency. Thereafter the taxpayer filed an appeal from the said notice of deficiency with the United States Board of Tax Appeals. On June 26, 1931, the Board of Tax Appeals promulgated its findings of fact and opinion in said appeal, and on June 29, 1931, the Board entered its final order of redetermination in said appeal, wherein and whereby the Board ordered and decided that there was a deficiency of \$13,380.44 for the year 1920.

III.

The deficiency for the year 1920, in controversy before the Board of Tax Appeals, arose and resulted from the determination of the Commissioner that the invention which the petitioner sold in the year

1920 had no fair market value on March 1, 1913. The Board of Tax Appeals held that the determination of the Commissioner was correct.

IV.

The petitioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of petitioner, and petitioner assigns the following errors, and each of them, which, she avers, occurred in said record, proceedings, decision and final [20] order of redetermination and upon which she relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to-wit:

1. The Board of Tax Appeals erred in holding that the invention of petitioner had no fair market price or value on March 1, 1913.

2. The Board of Tax Appeals erred in holding and finding that no competent evidence was introduced to prove that the invention had a fair market price or value on March 1, 1913, there being evidence to the contrary in the record and from the testimony of the witnesses.

3. The Board of Tax Appeals erred in not redetermining the deficiency in favor of the petitioner for the year 1920 and against the Commissioner for the year 1920.

V.

WHEREFORE, the petitioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and that a transcript of the record be prepared in accordance with the law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

CLAUDE I. PARKER,
GEORGE H. KOSTER,

Attorneys for Petitioner on Review,
808 Bank of America Bldg.,
Los Angeles, California.

JOHN B. MILLIKEN,
I. A. LUCE,
Of Counsel. [21]

[Title of Court and Cause.]

VERIFICATION OF PETITION FOR
REVIEW.

State of California,
County of Los Angeles.—ss.

George H. Koster, being duly sworn, says that he is one of the attorneys for the petitioner on review and as such is duly authorized to verify the petition

for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision in the above entitled case; that he has read the said petition and is familiar with the statements therein contained and that the facts therein stated are true except such facts as may be stated upon information and belief and those facts he believes to be true.

GEORGE H. KOSTER.

Subscribed and sworn to before me this 15th day of October, 1931.

[Seal]

MARGUERITE L. SAGE,
Notary Public in and for the County of
Los Angeles, State of California.

[Endorsed]: Filed Dec. 16, 1931. [22]

[Title of Court and Cause.]

NOTICE OF FILING OF PETITION FOR
REVIEW.

To:

C. M. Charest, General Counsel,
Bureau of Internal Revenue,
Washington, D. C.,
Attorney for Respondent on Review.

Please take notice that Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased, petitioner on review in the above entitled proceeding, did on the 16th day of December, 1931, file with the United States Board of Tax Appeals a

petition for review of the decision of said Board in the above entitled cause by the United States Circuit Court of Appeals for the Ninth Circuit, a copy of which said petition for review is herewith served upon you.

CLAUDE I. PARKER,
GEORGE H. KOSTER,
808 Bank of America Bldg.,
Los, Angeles, California,
Attorneys for Petitioner on Review.

JOHN B. MILLIKEN,
L. A. LUCE,
Of Counsel.

Service of the foregoing notice and service of a copy of the petition for review mentioned in said notice is acknowledged this 16th day of December, 1931.

C. M. CHAREST,
Attorney for Respondent on Review.

[Endorsed]: Filed Dec. 16, 1931. [23]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

The above entitled cause came on for hearing before the Honorable Stephen J. McMahon, Member of the United States Board of Tax Appeals, on May 16, 1930, at Los Angeles, California. George H. Koster, Esq., and Claude I. Parker, Esq., appeared for the petitioner on review, and R. W. Wilson, Esq., for C. M. Charest, General Counsel, Bureau of Internal Revenue, appeared for the respondent on review.

Prior to the testimony, the following opening statements were made by counsel for the respective parties:

Mr. KOSTER.—“In this case the petition was filed by the executrix of the estate of Robert G. Wagner, against deficiency proposed by the Commissioner of Internal Revenue on the income tax return filed by Robert G. Wagner for the year 1920 in the amount of \$13,380.44.

The sole issue involved is the question of the March 1, 1913, fair market value of an invention which was later sold by the taxpayer and his partner,—by Robert G. Wagner and his partner in the year 1920 to a corporation for an amount of \$85,000.

In computing the deficiency for the year 1920, the Commissioner of Internal Revenue allowed no value or cost against the sales price, thus taxing the entire sales price as a profit realized by Mr. [24] Wagner from the transaction.

We will endeavor to show by the proof that the invention had a fair market value on March 1, 1913, of at least \$100,000.

Mr. WILSON.—The deficiency proposed by the Commissioner for the calendar year 1920, as disclosed in said deficiency letter is, as counsel has stated, the sum of \$13,380.44. The petition is silent as to the proposed deficiency of \$1,081.61 for the calendar year 1921, and the Respondent understands at this time that Petitioner waives, or is not disputing the latter sum; is that correct?

Mr. KOSTER.—That is correct, if the Court please.

The MEMBER.—So we have involved just the deficiency for 1920?

Mr. KOSTER.—That is correct.

The MEMBER.—In the amount of \$13,384.44.

Mr. KOSTER.—Yes.

The MEMBER.—You may proceed with the proof, Mr. Koster.”

FREDERICK S. LYON,

called as a witness by and on behalf of the taxpayer, after being duly sworn, testified as follows:

Direct Examination.

My name is Frederick S. Lyon. I reside at Los Angeles, and for the past 38 years have been engaged exclusively in the practice of law as same

(Testimony of Frederick S. Lyon.)

may relate to patent, trade-mark and copyright matters. I became acquainted with Robert G. Wagner prior to 1912 and represented him in a number of patent matters. During either the latter part of November or in December, 1912, Robert G. Wagner and one Mr. Schweitzer brought to my office a light—an electric light, which they called “Briterlite,” with a request for my advice as to securing a patent therefor. The light was an electric lamp mounted in a globe of translucent material, and above it was a downwardly reflecting reflector of curved contour so as to [25] diffuse the light downward. Wagner and Schweitzer had manufactured the first light either in the latter part of November or early part of December, 1912, and production was started by them in a shop in Los Angeles soon afterwards. Subsequently they made an application for patent and a patent was issued on that lamp. When Wagner and Schweitzer first came to me, I caused an examination to be made of the records of the United States Patent Office and rendered them an opinion as to its patentability. I did not immediately file an application for a patent for the reason that the law allows an invention to be in use anywhere less than two years without barring the right to a patent.

Q. Was there any patent outstanding of any similar lighting system as the “Briterlite”?

A. The only question which was involved, preliminary, in that, was a patent owned, if I remem-

(Testimony of Frederick S. Lyon.)

ber the name of the St. Louis concern correctly, Luminous Unit Company—I may be wrong on some of these names, but I think it was the Guth patent,—that patent had been originally in litigation and the original claims were held to a certain limitation. I advised Mr. Wagner and Mr. Schweitzer that the Briterlite,—that was their invention and I will call it that for short hereafter, did not infringe that original patent. Subsequently an application was made by the Luminous Unit Company for a reissue or amended patent on that Guth invention, and a reissue was granted. The result of that was that while they were able to sustain the Guth patent generally, the rights of Mr. Wagner and Mr. Schweitzer could not, of course, be cut off, because they were intervening rights; having invested their money, they made their application for patent and had gone into actual manufacture, but before the application was reissued, so that Mr. Wagner and Mr. Schweitzer were able to continue in the manufacture and sale of their Briterlite without regard to the fact that the reissue patent shut out other people that were not licensed.

At the date of March 1, 1913, the so-called Brascolite,—I think I have got the name right, that was manufactured under the Guth patent by the Luminous Unit Company, was the most popular light or reflector, and in very great demand. I, personally, saw a great many installations of it here and elsewhere, and the only [26] non-infringing competitive

(Testimony of Frederick S. Lyon.)

light or fixture, if you want to be accurate, existed at that time because of these intervening rights of Wagner and Schweitzer, was the Briterlite we have been speaking of, that was produced in 1912 by Wagner and Schweitzer.

Thereupon the presiding Member propounded the following questions with the following answers:

(By the MEMBER.)

Q. Why do you say "non-competitive"?

A. I say "non-infringing."

Q. Non-infringing?

A. Non-infringing, because the Briterlite of Wagner and Schweitzer—

Q. I understand; it had intervening rights?

A. It had intervening rights.

Q. I understood you to say non-competitive.

A. No, I meant non-infringing.

Mr. KOSTER.—That is all, Mr. Lyon.

The MEMBER.—Cross-examine.

Cross-examination.

I was only familiar with the sales, amount of business done by the so-called Luminous Unit Company of St. Louis, to the extent that I saw numerous installations of theirs in San Francisco, Los Angeles and other cities of the United States during the years 1912, 1913 and 1914. I am positive there was competitive bidding for jobs with respect to the installation of their device. The Brascolite was in use in buildings in Los Angeles and San Francisco

(Testimony of Frederick S. Lyon.)

prior to March 1, 1913. I have never been in the employ of the Luminous Unit Company, St. Louis, nor have I in any way been interested financially in its affairs. At the present time and for many years [27] past the Brascolite has been in general use in office buildings throughout the United States. I observed many new installations of lighting fixtures that were of the Brascolite type in 1912, 1913, 1914 and 1915, and most of the new buildings that I observed during the aforesaid time were installing that type of lighting fixture. It is my recollection that the patent application for Brascolite was filed in the early part of 1914.

Q. In what details and particulars did this Brascolite to which you have been testifying, differ from the so-called Briterlite?

A. One of the particular differences which was material,—and I am speaking entirely from recollection,—one of them, if my recollection is correct, that was the Brascolite or Guth patent, showed a flat pan at the top,—that is the upper reflecting surface, and the original patent was limited to that being flat, and to the particular arrangement of the other reflecting surfaces with relation to it. Now, the Wagner and Schweitzer differed essentially in that it had a curved pan at the top, and was not within the scope of the original patent, although the reissued claims did not limit the Guth invention in that same manner.

(Testimony of Frederick S. Lyon.)

Q. When you refer to the Wagner and Schweitzer light, you are referring to Briterlite?

A. Briterlite; Briterlite is the trade name that they adopted for that, and when I say "they"—I mean Wagner and Schweitzer.

It was in November or December of 1912 that Wagner and Schweitzer, or one of them, came to my office with respect to securing a patent for them, and at or about the same time I went to their shops to look over the lights that they were building.

Q. Well, would you say that they had started the manufacture or production of these Briterlites as early as January of 1913?

A. What do you mean by "production"?

Q. You testified on direct examination that—
[28]

A. My recollection,—I am speaking from recollection only, and it is this,—that to my knowledge a contract was made for the production and installation by Wagner and Schweitzer of a number,—and I have forgotten how many it was—a fair-sized installation—as early as February, and my recollection is it was in the latter part of January, 1913.

Q. You were in their shop early in 1913, were you not?

A. Why, I was in their shop in 1913, yes.

Q. Well, I am not interested in any time after the first of March, the first two months,—January and February of 1913,—do you recall being in their shop at that time?

(Testimony of Frederick S. Lyon.)

A. I have no means of allocating the date from memory of March 1st, 1913, one side or the other.

Q. You do not have any personal knowledge, do you, as to the extent,—the actual extent—of this production as early as, or up to we will say March 1, 1913?

A. Do you mean by “knowledge” by investigation for the purposes of the opinion that I gave, as at that part of the critical time, I collected those facts; now, there was only one commercial installation except this first light that was made in 1912, that was made by Wagner and Woodruff, or Wagner and Schweitzer,—Woodruff came into the deal later—prior to the Summer of 1913, that is my recollection of that; I think that is the fact you want to get.

Q. You say one commercial installation?

A. Yes.

Q. Prior to the summer of 1913?

A. Yes.

ERNEST J. SCHWEITZER,

called as a witness by and on behalf of the taxpayer, after being duly sworn, testified as follows:

Direct Examination.

I reside in Los Angeles and have been engaged in the manufacture of lighting fixtures for the past eighteen years. I was engaged in such business

(Testimony of Ernest J. Schweitzer.)

during 1912 and 1913. During 1912 and 1913 I was also engaged in the manufacture of a lighting fixture called Briterlite. The Briterlite is a pan with three hooks on the bowl, [29] with a key hole in it to release the bowl by lifting up; that is one patent—then it is a convex—we have one convex and one concave reflector.

There was then introduced as Petitioner's Exhibit No. 1 a print of the lighting fixture called Briterlite, identified by the witness and which was received in evidence without objection.

I became interested in the development of the Briterlite in 1912 after Wagner and myself had observed how successful the Brascolite had become. The glare of a new gas light on the market was a very bad feature in our opinion and to reduce same we desired to get out our patent with respect to the convex and concave reflector, also with side hooks on the Briterlite, which was different from the Brascolite. Wagner and myself manufactured for sale the Briterlite during 1912 and 1913 and did so for subsequent years. We manufactured about eight different sizes during 1912 and 1913. The best seller we had during 1912 and 1913 sold for \$18.00 to \$20.00. I think we arrived at the sales price by taking cost and overhead and doubling the resulting figure. Wagner and myself each owned a one-half interest in the Briterlite and we sold our interest to the Wagner-Woodruff Company, of which com-

(Testimony of Ernest J. Schweitzer.)

pany we each owned one-half of the stock, I believe in 1922 for the sum of \$85,000 in property.

There was a big demand for the indirect lighting systems in 1912 and 1913 because the nitrogen lamp just came out and made it so bright against the Tungsten lamps that it gave a big opening for the indirect lighting unit.

Q. What, in your opinion, was the fair market value as of March 1, 1913, of your Briterlite invention?

Mr. WILSON.—Your Honor, just a moment, there has been no [30] proper foundation laid for the question; this witness has testified thus far that he was in a general electrical fixture business, in 1912 and 1913, and has been since that time, and he testified that this gaslight, I believe it is, came in, and as he said, it was going over big—

The WITNESS.—That was a gas lamp, the nitrogen lamp, it was a gas-filled lamp.

Mr. WILSON.—Yes, and that because of that demand, in part at least he and Mr. Wagner worked at this Briterlite. Now, there is no evidence in the record whatever relating to the existence of the invention, the extent, if any, to which it had been produced, placed on the market, or sold; the only testimony on that point is that they made eight different styles, and the best seller sold from eighteen to twenty dollars; there is no record how many were sold; as a matter of fact about the only

(Testimony of Ernest J. Schweitzer.)

thing we have thus far is that this witness was in a general electric fixture business in 1912 and 1913, and now he is asked to give his opinion,—I should say a figure, representing fair market value of a certain invention or product about which he has not been shown qualified to testify at all. There is almost an absolute dearth of any evidence, so far as this witness is concerned, relating to this particular product or the invention, so to speak, much less its value as of March 1, 1913; the Respondent submits that there has been no proper foundation laid for the question.

The MEMBER.—What have you to say to that, Mr. Koster?

Mr. KOSTER.—The witness has testified he was one of the inventors of this particular Briterlite; that he was manufacturing and selling it in 1912 and 1913; he knew of the demand existing for that type of light,—knew the reasons for the demand—I think he is qualified to testify as to what in his opinion was the fair market value of his invention at that time, based upon what he knew about conditions existing at that time.

Mr. WILSON.—If the Respondent could add this to the objection already offered, not only was there no evidence tending to show that the invention of this witness and Mr. Wagner was identical with the products that they, as the witness testified, had “gone over big”—until some evidence is produced

(Testimony of Ernest J. Schweitzer.)

showing that the two lights, or that the several lights, whatever number there may have been, were similar; further, that there was a demand for all of them,—what the demand was,—the extent of the demand,—the extent to which they were in use,—unless you have some or all of those factors, you have nothing on which to predicate a fair market value as of a specific date; in the absence of any evidence as to the extent that this product was on the market on March 1, 1913,—we have simply been [31] told that their best seller sold at a certain figure,—not the extent to which they were sold, or how many this man and his partner who were in business sold at all——

The MEMBER.—Are you asking now for his opinion as to the value of the patents?

Mr. KOSTER.—The value of the invention at that time; Mr. Lyons testified that he had an invention at that time that it was not patented until later; that during this period he had an exclusive right and he had protection.

The MEMBER.—You are asking the value of his invention?

Mr. KOSTER.—Yes.

The MEMBER.—As of March 1, 1913?

Mr. KOSTER.—Yes.

The MEMBER.—It had not been patented at that time?

(Testimony of Ernest J. Schweitzer.)

Mr. KOSTER.—No, it had not been patented, but it had a value as if it were patented, as explained by Mr. Lyons, the previous witness on the stand.

The MEMBER.—You want the fair market value; is that what you want?

Mr. KOSTER.—Yes, sir.

The MEMBER.—Of the invention as of that date?

Mr. KOSTER.—That is right.

The MEMBER.—Do you not think you ought to establish first that there was a market value: it does not appear here thus far in the proof, as I view it, that there was a fair market value or a market value for this invention; of course there was a market value for the lights, but that is another matter.

Mr. KOSTER.—Let me ask this question:

(By Mr. KOSTER.)

Q. What, in your opinion, is the fair market value as of March 1, 1913, of your Briterlite invention, and the exclusive right to manufacture and sell that type of lighting fixture?

Mr. WILSON.—Same objection.

The MEMBER.—Do you consider it established that they had the exclusive right? [32]

Mr. KOSTER.—Yes, if the Board please.

The MEMBER.—What testimony do you rely upon to support the assumption that they had the exclusive right?

(Testimony of Ernest J. Schweitzer.)

Mr. KOSTER.—Well, we have the testimony of Mr. Lyons, the previous witness, to the effect that these men came to him with this invention; that he advised them that they had an exclusive right which was protected under the patent laws as fully as if it were patented at that time, within a period of two years prior to the filing of the application for a patent, as brought out by Mr. Lyons; application for patent was later made, and the patent granted; the witness has testified that there were only two other indirect lighting fixtures outside of this Briterlite that were in use in 1912 and 1913,—that was the Brascolite and the Phoenix light; he testified that he was familiar with the demand existing at that time for this indirect type of lighting fixture; that the reason for the demand was because of the innovation of a new type of light, which required indirect lighting systems. I believe the witness is qualified to give an opinion as to the fair market value of his invention and his rights under his invention.

The MEMBER.—At this time you are offering this witness as an expert, are you?

Mr. KOSTER.—Yes.

The MEMBER.—Upon the subject of the fair market value of this invention as of March 1st, 1913?

Mr. KOSTER.—Yes, I am asking both as an expert and as an owner.

(Testimony of Ernest J. Schweitzer.)

At this point in the testimony the following colloquy occurred:

The MEMBER.—Do you wish to examine him at this time as to his qualifications as an expert, Mr. Wilson?

Mr. WILSON.—I should like to do so, yes.

The MEMBER.—You may do so.

The following records the examination of the witness by Mr. Wilson:

I have been engaged in the lighting business for the past eighteen years and Robert G. Wagner and myself were partners in the lighting business beginning with the year 1911. We also owned a [33] corporation known as the Wagner-Woodruff Company which was also engaged in the same business at or about the same time. Our immediate manufacturing business was carried on in Los Angeles, but I had occasion to observe the styles and types of lighting fixtures in other cities of the United States, particularly in the states of California and New York.

Q. Now, in 1912 and up as late as March 1, 1913, to what extent, if you know, had this new indirect lighting system come into use?

A. Why, most all of the commercial people that put in that light, General Electric, Edison Company, and all of those, on account of the new Mazda lamp,—gas filled lamp,—they had to have something to protect their eyes.

(Testimony of Ernest J. Schweitzer.)

Q. Well, where do you mean they had put it in?

A. Commercial lighting—offices.

I was informed by salesmen that a concern in St. Louis were having considerable success during 1912 and 1913 with a light known as Brascolite. I was not interested financially or otherwise in the company that manufactured the Brascolite. I could not say what the patent of the Brascolite was worth at March 1, 1913.

Mr. WILSON.—That is all.

The MEMBER.—Have you finished qualifying this witness on the subject of value?

Mr. KOSTER.—Yes, your Honor.

The MEMBER.—Will you now restate your question that you want him to answer?

Q. What, in your opinion, was the fair market value on March 1, 1913, of your Briterlite invention, and the exclusive right to manufacture and sell that lighting fixture known as Briterlite?

The MEMBER.—Just a moment; you may restate your objection to this question, Mr. Wilson.

Mr. WILSON.—The objection by the Respondent to the question is predicated first upon the insufficiency of evidence thus far adduced from this witness to establish any [34] first-hand knowledge on his part as to those facts which enter into any opinion or expert testimony as to the extent to which the invention in question was in production or had been put in production or was on the mar-

(Testimony of Ernest J. Schweitzer.)

ket. Secondly the absence of any evidence which shows that this witness had any knowledge of the value,—that is the fair market value as of March 1, 1913, of the so-called Briterlite patents, upon which invention this witness' testimony has thus far been predicated. In other words the testimony thus far has been a comparison of the success and extent of marketing the so-called Briterlite lighting fixture and the so-called Briterlite fixture which was the invention of the petitioner and the witness.

The Respondent submits that the testimony has shown the witness to be a man engaged in the general lighting fixture business over a period of only about one year prior to the basic date, and to be possessed only of a very general knowledge regarding the nature of the so-called Brascolite fixtures, or the extent to which it was on the market, and summarizing, the record is barren of sufficient proof or evidence to show, first, that the Briterlite fixture was even on the market, or if so, to what extent, and of any other and all other features which necessarily go to make up and constitute qualification to testify as an expert.

The MEMBER.—What have you to say, Mr. Koster?

Mr. KOSTER.—If the Board please, this witness has testified that he knew all of the factors that entered into the question of the value of this particular invention; he knew the demand for types

(Testimony of Ernest J. Schweitzer.)

of fixtures similar to the Briterlite; he knew what the Briterlite cost him to make; he knew what it would sell for; he knew the profit he could be expected to make on it; he knew the demand, as I say; he invented the product; his testimony is that he has been in the lighting fixture business for the last eighteen years; I believe he is qualified to testify as to the March 1, 1913, value of that invention, and the rights under that invention; as to comparisons with the Brascolite, we compared it to show reasons for expectation of demand, and also the fact that the competition was very limited. This witness can not be expected to know what the sale, or what the profit being realized by the Brascolite people was, or what their valuation of any patent rights they might have would be; he is valuing just his own fixture,—the Briterlite.

Mr. WILSON.—If the respondent be permitted to use an illustration which may perhaps clarify the position taken by the respondent, if, for the sake of argument we leave the subject of lighting fixtures and use automobiles, as an illustration. Now, it is equally true that the automobile was being developed in these earlier years, back in 1911, 1912 and prior thereto, the same as lighting fixtures were [35] being modernized each year. Now, assuming that a witness testifies on direct examination that he was personally aware of the fact in 1911 and 1912 and perhaps for years prior thereto, that the

(Testimony of Ernest J. Schweitzer.)

automobile was making great headway all over the country,—it was a matter of general common knowledge and undisputed, several different kinds of makes of automobiles, all a little different, of course, but the general increasing in sales each year, the general public taking them up more as time passes. Now, he answers this question, being asked with regard to other makes of automobiles than the one he has worked on and invented,—he is asked if he is in a position to give a figure which would be representative of the fair market value of one of these other makes of automobiles as of March 1, 1913, and he says no; then by what possible reasoning could it be concluded that such a witness would be reliable to testify as to what the fair market value of March 1, 1913, would be of his automobile, if he is unfamiliar with the very machines which he has used as a comparison to arrive at an opinion that there was any value; if his knowledge is not such as to be able to give any kind of a figure representing the value of the comparisons, then how can he possibly do so as to his own, your Honor, particularly where the invention of the petitioner was newer, and thus far has not been shown to be on the market at all, except as Mr. Lyon testified, near the conclusion of his testimony, that he thought there had been one commercial installation prior to the summer of 1913, and the only other testimony has to do with what one certain unit brought, without

(Testimony of Ernest J. Schweitzer.)

any supplemental testimony as to the extent to which those units were sold.

The MEMBER.—Have you any authorities in support of your contention, Mr. Koster, that this proof is admissible?

Mr. KOSTER.—I do not have them here, if the Board please, but I would be glad to submit a brief on the question later on.

The MEMBER.—I will take this answer subject to the objection, and I will rule on the admissibility of the proof finally as the case is disposed of,—I will reserve an exception in favor of the party against whom that ruling may go, and I want to say now that I am impressed,—I want to say that, in fairness to counsel for the taxpayer, I am impressed that this is not admissible—that this witness has not been qualified as an expert on this subject, and I would like to have this question of the admissibility of this proof, or any proof of this character set out properly in any briefs that you may submit. I would like to have the authorities cited. Objection sustained. Exception granted and noted. S. J. M.

Mr. KOSTER.—I presume there is no objection to the answer being made as to the value placed upon the product by the [36] owner; in other words, this question I am asking this witness as to value he placed upon an invention and the right which he, himself owned, could be answered by him as an owner.

(Testimony of Ernest J. Schweitzer.)

The MEMBER.—I think there is a very serious question about that, where it does not appear that he is conversant with the values; it does not appear that he knows if there is a market or was a market as of that date for this article,—I mean now, of the invention,—I am not talking now of the manufactured product—I think there is a serious question about the admissibility of his opinion on that question,—I mean on the subject of the value of the invention as of that date.

Mr. KOSTER.—And the rights under the invention.

The MEMBER.—Yes; the mere fact that a man has made an invention, and owns an invention, it does not follow from that he is in position to give an opinion—an expert opinion as to the value of those inventions—that is something for the Board to pass upon, and it is a question whether or not an opinion of a man who has not been shown to know something about the market value as of a certain date,—it is a question whether his opinion would be of any value to the Board.

Mr. WILSON.—Yes, your Honor.

Mr. KOSTER.—It is a question of the weight of his opinion.

The MEMBER.—No, it is a question now whether his opinion is admissible at all. I want to hear you in the brief fully on that subject.

Mr. KOSTER.—All right.

(Testimony of Ernest J. Schweitzer.)

The MEMBER.—He may answer the question.

Mr. KOSTER.—Can you find the question, Mr. Reporter?

(The pending question was thereupon read by the Reporter, as follows):

Q. What, in your opinion, was the fair market value on March 1, 1913, of your Briterlite invention and the exclusive right to manufacture and sell that lighting fixture known as “Briterlite”?

The MEMBER.—If you know, or rather, if you can answer that question. Do you understand the question?

The WITNESS.—Yes, sir.

The MEMBER.—Can you answer it?

The WITNESS.—I put my value on it at that time; is that what you want, Judge? [37]

The MEMBER.—No, that is not the question; just read the question again.

(The pending question was thereupon again read by the Reporter.)

The MEMBER.—Now, you see, that asked about what the market value was of the property described in the question. Now, the first question I am going to ask you this, is whether or not you know what the market value of this invention was,—these rights set forth in the question,—we are not talking about what you think it was worth,—the question is what the market value was, now, do you know?

(Testimony of Ernest J. Schweitzer.)

The WITNESS.—Well, I could not answer that that way, Judge, because we put a price on the Briterlite at one hundred thousand dollars.

The MEMBER.—Then, that is just your own value?

The WITNESS.—Mr. Wagner and I.

The MEMBER.—Now, that is your own value; that is not the question, then, of what the market value was, is it?

The WITNESS.—Well, we never put it on the market for sale.

The MEMBER.—So you do not know what the market value of those patents was, is that true—those inventions?

The WITNESS.—It might have been the same as the Brascolite; the Brascolite made three million dollars and perhaps more.

The MEMBER.—Just answer my question. You say this value of one hundred thousand dollars is the value that you and your associate Mr. Wagner fixed?

The WITNESS.—Yes, sir.

The MEMBER.—That is what you thought it was worth?

The WITNESS.—Yes, sir.

The MEMBER.—But you did not know,—you did not take into consideration in fixing that value as to what the market value of the invention and the rights were, is that right?

(Testimony of Ernest J. Schweitzer.)

The WITNESS.—We did not have it up for sale, no.

The MEMBER.—So this figure of one hundred thousand dollars is your own estimate and that of Mr. Wagner?

The WITNESS.—Yes, sir. [38]

The MEMBER.—Of what this invention and these rights were worth, as of March 1, 1913, is that right?

The WITNESS.—Yes, sir.

Mr. KOSTER.—That concludes the direct examination, your Honor.

The MEMBER.—I will let the answer stand subject to the objection, and with the understanding I will pass upon the question whether or not it should be received, and I will rule upon it when I dispose of the case; what I said about the brief on the subject applies to this answer as well as any other answer that was given on that subject. Objection sustained. Exception granted and noted. S. J. M.

Mr. KOSTER.—That is all.

The MEMBER.—Cross-examine.

Cross-examination.

The experimental work on the Briterlite invention was performed at 830 South Olive Street, Los Angeles, which was the place at which the factory of the Wagner-Woodruff Company was located.

(Testimony of Ernest J. Schweitzer.)

Mr. Wagner and myself sold this invention in the year 1920 to the Wagner-Woodruff Corporation for the sum of \$85,000.00 in property. We sold to the Wagner-Woodruff Corporation both the basic patents and all design patents, and I do not remember the segregation of the purchase price as to each type of patent. I do not know without observing the records the extent to which we had manufactured the Briterlite up to March 1, 1913.

GEORGE J. McKENZIE,

called as a witness by and on behalf of the taxpayer, after being duly sworn, testified as follows:

Direct Examination.

I reside in Los Angeles and am manager of the Wagner-Woodruff Company and have been connected with that company for the past eighteen or nineteen years. The company is engaged in the manu- [39] facture of lighting fixtures. I was with the company in the years 1912 and 1913 and the company began the manufacture of the Briterlite fixture in the year 1912. The Briterlite fixture is a semi-indirect type of lighting fixture—that is, a glass bowl below, an opaque upper reflector; a curved reflecting surface, and the upper reflector was what might be called a concave reflector.

(Testimony of George J. McKenzie.)

Q. Were there any other types of fixtures of this nature in existence at that time?

A. There was one other type that resembled that that was known as the Briterlite,—I mean known as the Brascolite—it was similar inasmuch as it had an upper reflector with a translucent bowl, but the opaque top reflector had a perfectly flat reflecting surface as against the concave by the Briterlite, and the upper reflector of the Briterlite was stepped down in such manner as to eliminate any shadow upon the ceiling where the fixture was used as a ceiling type; the bowl on the Briterlite was suspended from the outside of the reflector, against the Brascolite being suspended probably about two inches from the edge of the reflector, the feature of the Briterlite over the Brascolite pertaining to that method of suspension of the bowl, was that it allowed the bowl to be removed more readily for cleaning of the bowl and renewing the lamp.

Q. Do you know whether there was a demand for this type of fixture in the commercial world?

A. I beg your pardon.

Q. Do you know whether there was a demand for this type of fixture?

A. Yes, there was a tremendous demand for this type of fixture.

Q. Do you have any reason for that demand?

(Testimony of George J. McKenzie.)

A. Yes, the reason is very definite; at about that time the National Lamp Works, who practically controlled the distribution of electric lamps, changed their type of lamp to what is known as the nitrogen or gas-filled bulb, and it was such a pure white glaring light that it was absolutely essential that it be covered in some way; it was blinding to look at the actual bulb of the lamp, and everybody that was manufacturing lighting fixtures was attempting in some way to develop something that would eliminate that glare and make the fixture livable. Up to that time all fixtures with possibly one or two exceptions were what you would call direct light [40] fixtures,—direct reflector, with possibly multiple reflectors,—anywhere from three to ten to a fixture, with the lamp exposed, because the carbon or Tungsten lamps were in use—they had more of a reddish yellow cast to them and were not objectionable to look at. The other type of fixture which was on the market and had been marketed successfully was known as the Finish (Phoenix) Light; it had a similar principle except it was all glass, the upper reflector as well as the lower were glass. Those were the only two fixtures that were developed and marketed, to my knowledge, to any great extent.

The retail selling price of the Briterlite during the years 1912 and 1913 was based on the cost of the labor and material as a basic cost of the fixtures

(Testimony of George J. McKenzie.)

and fifty per cent of such basic cost was added to determine the overhead, and the retail price was determined by doubling both amounts. The public and trade demand for the indirect lighting fixtures, such as the Briterlite and Brascolite, was very great during the years 1912 and 1913 and was much greater in those years than during the year 1920 when new patents were developed which made the cost of installation of the new type much cheaper and had a much greater utility value than did the Briterlite or the Brascolite. The Briterlite invention and patent was acquired by Wagner and Woodruff during the year 1920. I sold fixtures during the year 1911, and for seven years prior to that I was in charge of the silverware department and lamp department of D. C. Percival and Company, wholesale jewelers. I am familiar with the demands for indirect lighting fixtures in 1912 and 1913, and I am familiar with the rate of profit resulting from the manufacture and sale of the Briterlite fixtures during the years 1912 and 1913.

Q. What would you say would be the comparison of values of the Briterlite invention and the exclusive rights to manufacture and sell thereunder as between 1920 and 1913?

Mr. WILSON.—That is objected to, your Honor; it is wholly immaterial; we are not concerned with any 1920 value,— [41] it is wholly immaterial whatever value this invention increased or decreased

(Testimony of George J. McKenzie.)

after 1913, we are not concerned, nor does the disposition of this case in any wise hinge upon 1920 value,—it was sold in 1920 for an estimated figure of eighty-five thousand dollars, that is not in dispute what it was sold for in 1920.

Mr. KOSTER.—If that fixture had a value of eighty-five thousand in the year 1920 and this witness can testify as to conditions existing between those times and at those times and can compare the values as he sees them in 1920 and 1913, I should think that that would be admissible, at least for a comparison with values existing between those two dates, or at those two dates.

Mr. WILSON.—Well, in answer to that statement, your Honor, I would suggest this: This witness has been asked right from the start of his examination concerning the first types of lighting fixtures, and then he explained in some detail how the demand for indirect lighting fixtures grew and explained briefly the difference between the Brascolite and the Briterlite, and testified that he was familiar with the demand for indirect lighting in 1912 and 1913; now, every word of that testimony goes to lighting fixtures we are concerned here with a certain property right, namely an invention; we are not concerned here with value of fixtures as merchandise; we are concerned here with fair market value of a property right, namely value of an invention as of March 1, 1913; I submit the

(Testimony of George J. McKenzie.)

witness has not been qualified to testify at all either as to a figure representing the fair market value at March 1, 1913, or a comparative figure,—you can not compare a value or fixture with the value of an invention; they are altogether different rights and property.

The MEMBER.—Read the last question, Mr. Reporter.

(The pending question was thereupon read by the Reporter.)

The MEMBER.—He may answer.

Mr. WILSON.—May I have an exception?

The MEMBER.—Exception noted.

Mr. KOSTER.—Will you read that question a little louder, Mr. Reporter?

(The pending question was thereupon read by the Reporter.)

The WITNESS.—I do not quite understand that question; who is putting this question?

Mr. KOSTER.—This is the question that was asked you before you were interrupted in your answer. [42]

The MEMBER.—You may re-state the question to the witness; he says he does not understand it.
(By Mr. KOSTER.)

Q. Will you state whether or not the value of the Briterlite invention and the exclusive rights to manufacture and sell thereunder were greater or less in 1920 than in 1913 and 1912?

(Testimony of George J. McKenzie.)

A. They were less in 1920 than in 1912; is that the question?

The MEMBER.—Now, do you object to this question and answer?

Mr. WILSON.—Yes, sir, on the grounds heretofore stated, your Honor.

The MEMBER.—You move to strike it out?

Mr. WILSON.—Yes, I move to strike it out.

The MEMBER.—The answer will be allowed to stand, subject to the objection and the motion, and the question of admissibility will be disposed of at the time of the decision in the case, and the exception will be reserved for the party against whom the ruling may go. The objection is sustained. The motion is granted. Exceptions are granted and noted. S. J. M.

Mr. KOSTER.—That is all.

The MEMBER.—Cross-examine.

Mr. WILSON.—No cross-examination.

The MEMBER.—You are excused.

MAX L. GORDON,

called as a witness by and on behalf of the taxpayer, after being duly sworn, testified as follows:

Direct Examination.

My name is Max L. Gordon and I reside in Los Angeles. I have been engaged in the lighting fixture business and was one of the owners of the

(Testimony of Max L. Gordon.)

California Fixture Company from 1909 to 1912. I then sold out and was the owner of the National Fixture Company from 1912 to 1925. Prior to 1909 I was also engaged in the lighting fixture business and have been in that business practically all my life. I am familiar with the type of lighting fixtures in use during the years 1912 and 1913. I sold the Brascolite fixture quite [43] extensively in my business, and in my business I was also engaged in the manufacturing of lighting fixtures and am familiar with the cost of manufacturing lighting fixtures. I am familiar with the demand for lighting fixtures, particularly in California, and also the company with which I was connected had three traveling salesmen that canvassed the lighting fixture trade all over the country.

Q. Do you know what the general method was for arriving at list price—sales price for fixtures,—and has that method prevailed in the fixture business during the years 1912 and 1913?

A. Yes, sir.

Q. What was that method?

A. Take the cost of material plus the labor, add fifty per cent for general overhead, shop expense, and so on, and double that cost, and you have the retail selling price.

Q. What, in your opinion, was the fair market value as of March 1, 1913, of the Briterlite invention and the exclusive right to manufacture and sell under that particular invention?

(Testimony of Max L. Gordon.)

Mr. WILSON.—Just a moment; that question is the first mention, your Honor, that counsel or witness have made of any invention at all; they have been talking here about the general sale and the market of light fixtures and the general method of arriving at sales prices, and now, without any further preliminaries, the witness is asked to state an opinion as to the fair market value of a certain invention, which, so far as the record thus far shows, he knows nothing whatever about.

Mr. KOSTER.—If the Board please, the witness testified that he knew the Briterlite,—knew the light,—knew what it was sold for,—he knows what the general profit to be realized from the sales of fixtures are or were at that time; he knew the demand; he was engaged in the business of manufacturing and selling fixtures; he is competent to determine the price for a light such as the Briterlite, and the price at which it could be purchased and still realize a profit to the purchaser.

Mr. WILSON.—May the respondent be permitted to ask the witness a question with regard to qualifications? [44]

The MEMBER.—Yes.

(By Mr. WILSON.)

Q. Mr. Gordon, you and your company handled and sold several different types of fixtures, did you not?

A. We sold our own make and makes of others, that is, not as much as our own makes.

(Testimony of Max L. Gordon.)

Q. Now, you were more interested, of course, in the sale of your own products?

A. Of our own products, yes.

Q. Now, do you recall, Mr. Gordon, the fact that you did handle the Briterlite fixture as early as 1913?

A. We never sold the Briterlite fixture.

Q. You never sold it?

A. We never sold it, but I knew the Briterlite fixtures as well as I knew our own.

Q. You knew that they were being manufactured and sold?

A. Yes.

Q. You knew the kind of light it was?

A. We would have liked to have sold them, if we could have possibly made arrangements with Mr. Wagner.

Q. You were unable to sell it because it was patented?

A. And he was a hard man to deal with.

Q. Well, were you ever connected at any time with Mr. Wagner or Mr. Schweitzer or the corporation, the Wagner-Woodruff Corporation?

A. I knew them all.

Q. I say, were you interested in them?

A. No, never.

Q. You had no connection with the office or plant?

A. No.

(Testimony of Max L. Gordon.)

Q. You do not profess to know anything of your own knowledge at all regarding the extent of their manufacturing activities in 1912 and 1913, did you? [45]

A. In reference to that fixture?

Q. The extent of the manufacture, yes.

A. Well, I knew they were a pretty live concern that were doing a lot of manufacturing.

Q. You knew they were doing a lot of business?

A. I sure did; they were a large competitor of ours.

Mr. WILSON.—I think that is all.

The MEMBER.—Read the question, Mr. Reporter.

(The pending question was thereupon read by the Reporter, as follows:)

“Q. What, in your opinion, was the fair market value as of March 1, 1913, of the Briterlite invention and the exclusive right to manufacture and sell under that particular invention?”

The MEMBER.—What is your objection; what are the grounds for the objection?

Mr. WILSON.—The witness is now asked to answer a question regarding the fair market value of a certain property right, namely an invention. This witness has testified, as your Honor has heard, the length of time he has been in business, the nature of that business; he has testified he was familiar with this Briterlite fixture; he has not said anything about the invention as a property right;

(Testimony of Max L. Gordon.)

he has been talking about the Briterlite fixture, in answer to my questions a moment ago he stated that his firm had never sold the Briterlite, because they could not; that he was familiar with the fixtures and knew that it was in production and recognized it, that is, the company, as a competitor. Now, nowhere, either in that examination or in the witness' direct examination has there been a word stated about the invention property right, the fair market value of which is here now being sought to be established; the witness is wholly unqualified thus far to give any testimony in regard to the value of the invention—the property right.

The MEMBER.—Do you understand the question that is before you now?

The WITNESS.—Yes, sir.

The MEMBER.—Can you give an opinion as to this value?

A. I can.

Q. You say you can? [46]

A. I can.

The MEMBER.—You may answer, subject to the objection of counsel for the respondent. Objection sustained. Exception granted and noted. S. J. M.

The WITNESS.—I will answer it in my own way.

The MEMBER.—With the understanding that an exception will be reserved to the party against whom the ruling goes, when the ruling is finally made; you may just answer the question, if you

(Testimony of Max L. Gordon.)

understand the question. Objection sustained. Exception granted and noted. S. J. M.

The WITNESS.—I can answer the question in my own way?

(By Mr. KOSTER.)

Q. Yes, you may answer the question.

A. The reason I say that is we had several large jobs we were figuring——

The MEMBER.—Just a minute, we do not want any argument here, we want an answer to this question, which is a plain question, asking for your opinion as to a value. Objection sustained. Exception granted and noted. S. J. M.

The WITNESS.—If I were to estimate the value of that patent, if I could have had it at that time, I would have been willing to pay about seventy-five to one hundred thousand dollars for it, because I know the demand was great.

(By Mr. KOSTER.)

Q. Upon what, I will ask you, would you base that opinion of value, Mr. Gordon?

A. We were selling, starting in from about 1913, about 3,000 National lights a year, and there was no comparison, as far as the National Light and Briterlite was concerned in appearance, because, for the reason, I would safely say, and will readily make that statement, when we would submit both samples on some particular contract, and invariably the Brascolite would win; the exception in that case was the Rosslyn Hotel, we happened to win, but in

(Testimony of Max L. Gordon.)

most cases the Brascolite, it was easier to clean——

Q. Are you referring to Brascolite?

A. I am referring to the Briterlite; it was easier to clean, to detach a bowl from the plate, and it was a better looking fixture than ours; of course, we are out of business now.

Q. What factors did you use in computing your value of seventy-five to one hundred thousand dollars? [47]

A. Well, I would have been willing to pay a dollar per unit as a royalty, if I could have got the exclusive right to it, even for California on account of so many new and old constructions going on on buildings, and so on.

Q. What was your estimate of the number of units that might be sold under the right?

A. I would safely say ten thousand a year.

Q. For what period of years?

A. Well, the economic life of a thing of that kind, I would say ten years.

Q. Then, what would you do,—I am trying to find out——

A. Well, we would still sell it, I, as a manufacturer, would take advantage of it, if I would pay the seventy-five thousand, would take advantage of the rest of the time for myself, as additional profit; if I were to sell 500, I would consider that 500 as additional profit to my concern.

Q. Now, in arriving at the value you place upon this, what other factors do you use, and how do

(Testimony of Max L. Gordon.)

you apply those factors; you have stated now the number of units you estimated would be sold, the royalty rate; just explain how you compute your value.

A. What do you mean by "value"?

Q. You stated the value was seventy-five to one hundred thousand dollars?

A. Yes, I estimate the value so many fixtures a year,—say ten thousand a year, at a dollar per fixture, is ten thousand dollars; if I could buy that patent for seventy-five thousand, why I would think it would be a good investment, and that would be, when I say seventy-five thousand, I refer to the Pacific Coast alone,—my experience,—I have not sold any fixtures back east until 1923, then I had three men on the road.

Mr. KOSTER.—That is all.

The MEMBER.—Cross-examine.

Cross-examination.

I would have paid seventy-five to one hundred thousand dollars for the exclusive right to manufacture that particular fixture for the Pacific Coast. [48]

Q. For the patent?

A. For the patent.

JEROME FUGATE,

called as a witness by and on behalf of the taxpayer, after being duly sworn, testified as follows:

Direct Examination.

My name is Jerome Fugate. I reside in Los Angeles. I am at present a partner in the Wagner-Woodruff Company. I have been a partner for the past three years. Prior to that time I was associated with the Myberg Company of Los Angeles in the capacity of selling their product. I was employed by the Myberg Company about seven years. Prior to that time I was in the business of designing and manufacturing lighting fixtures for myself at Tacoma, Washington. Prior to that time I was manager of the Mullins Electric Supply Company at Tacoma, Washington. During the years 1912 and 1913 I was associated as a salesman with the W. G. Hudson Company of Los Angeles, selling lighting fixtures, and during the years 1909, 1910, 1911 and 1912 I was with the Capital Electric Company of Salt Lake City, which company was engaged in the designing, manufacturing and distribution of lighting fixtures and supplies. While associated with the Capital Electric Company I was their traveling auditor. The Capitol Electric Company was a very large concern and conducted a very extensive jobbing and manufacturing business. I am familiar with the types of lighting fixtures in existence in 1912 and 1913. The Brascolite fixture was by far the best known fixture, and

(Testimony of Jerome Fugate.)

following that came the Briterlite fixture manufactured in Los Angeles and then the Phoenix light.

Q. Do you remember how the Briterlite fixture compared with the Brascolite fixtures in 1913, as to its salability? [49]

A. It could easily be sold in competition with the Brascolite, because of the superior features which it had from a selling standpoint.

Q. Do you know what the sales of the Brascolite fixtures by the Central Capitol Electric Company was during the period you were employed by them?

Mr. WILSON.—That is objected to, your Honor, if the witness is now called upon to give figures representing the sales; the books and records of that company is the best record of what sales were made.

Mr. KOSTER.—I am asking if he knows; he can answer that yes or no.

The MEMBER.—The question is, do you know?

The WITNESS.—I could not answer in dollars and cents, sir, no sir.

(By Mr. KOSTER.)

Q. Do you know approximately the extent of sales of that type of fixture in the territory you mentioned, by the Capitol Electric Corporation, during the years you were employed by them?

Mr. WILSON.—Same objection.

The MEMBER.—What is your objection?

(Testimony of Jerome Fugate.)

Mr. WILSON.—He is asking this witness to testify, as I understand it, to the volume of sales by a certain company for a certain period of time. The objection is that the books and records of that company are the best evidence what sales were made; the books reflect their volume of business and sales. The second ground of objection is it is wholly incompetent, irrelevant and immaterial as to what that company may have sold in a given year; that has no relation to the issue here as to the March 1st, 1913, value of a certain invention, your Honor.

(By the MEMBER.)

Q. You did not sell the Briterlite at the time in question?

A. I did not.

The MEMBER.—Objection sustained.

Mr. KOSTER.—If the Board please, the factors in determining values of a property right such as this, primarily you must consider the demand that can be reasonably estimated or could be contemplated for that particular product, manufactured under that right; [50] now, we compare this product that we have with the Briterlite, primarily showing it was a superior product and showing in general the demand for the Brascolite,—since the Briterlite was not manufactured prior to 1912, and we can not show sales of the Briterlite prior to 1913, we should be able to make some use of the demands and the actual sales of similar fixtures as

(Testimony of Jerome Fugate.)

a comparison, to show there was a demand and it could be reasonably expected that the same demand could be contemplated for a fixture of superior character. I am asking the witness to state generally what the demand was during the time he was with the Capitol Electric Company in 1909 to 1912, in the territory covered by that corporation.

The MEMBER.—The ruling will stand; the objection is sustained.

Mr. KOSTER.—May I have an exception?

The MEMBER.—Exception granted.

(By Mr. KOSTER.)

Q. Assuming that you had, or that you could purchase at March 1, 1913, or thereabouts, a right, a patent or an invention, together with the exclusive right to manufacture and sell that patent or invention covering a lighting fixture, which was superior to Brascolite at that time; what would you consider, or what in your opinion would be the fair market value of a product (property) at that time, of the product (property) that was being offered to you for sale or for purchase?

Mr. WILSON.—That is objected to, your Honor, for the reasons which certainly must be obvious; in the first place the question is predicated upon the assumption that the Briterlite invention was, in fact, superior to any other product, namely Brascolite, concerning which we know absolutely nothing. In other words, the answer, even if given,—even if an answer were made here would most cer-

(Testimony of Jerome Fugate.)

tainly be subject to a motion to strike on the ground that it is wholly incompetent, irrelevant and immaterial. The second ground of the objection is that the question assumes the value of a certain property right which is patented. Now, the evidence in this case clearly shows that this invention was not patented on March 1, 1913, at all, the application was not made until in 1914 and the patent issued in 1915, so that the hypothetical question does not cover the facts thus far developed in this case.

The MEMBER.—In the first place, did you understand the question?

The WITNESS.—I think I do, sir. [51]

The MEMBER.—Do you want it read again?

The WITNESS.—I would prefer to have it read again.

The MEMBER.—Read the question.

(The pending question was thereupon read by the Reporter.)

The MEMBER.—In the first place, can you answer that question; that is something you can answer yes or no; I am asking you if you can answer that question; I would like to have you answer yes or no.

The WITNESS.—Yes, sir.

The MEMBER.—You can answer that question?

The WITNESS.—I think so.

The MEMBER.—The answer will be taken, subject to the objection. Objection sustained. Exception granted and noted. S. J. M.

(Testimony of Jerome Fugate.)

The WITNESS.—Well, I would first, of course, have to base the value of such a right to manufacture on what the supply and demand for the product in question would be. The only thing I would have to base such an estimated value upon would be, naturally, upon my knowledge of the distribution possibilities, based on past experience of a similar type fixture in the United States, in general, distribution possibilities, in other words. I would say that in my experience with the Capitol Electric Company of Salt Lake City, where we operated this chain of twenty-one stores, that I made reference to using that as a basis; the average sales of those institutions ran very close to ten thousand a month; they were not large institutions,—about half of their sales were based upon commercial fixtures,—store lighting fixtures,—office building fixtures, and so on. This Brascolite had absolutely been the only unit that could be sold in this territory, coming into Los Angeles, I found the Briterlite invention here in use and it offered a highly competitive fixture which could readily be sold in competition with the Brascolite, and it would have been little or no problem whatever for any manufacturer to have easily reached a distribution of one hundred thousand units per year in the United States. I would base that upon the averages of sales for an average store,—an average institution running around one thousand units per year; it would not be very difficult to obtain one

(Testimony of Jerome Fugate.)

hundred of such distributing points in this country; I would say a very fair market value for the privilege of manufacturing such a fixture would have been, at a minimum, one hundred thousand dollars. [52]

Cross-examination.

I was passingly acquainted with Mr. Wagner during his lifetime, and have had an intermittent acquaintance with Mr. Schweitzer since 1914. The first time I had occasion to see their plant was in the year 1927. I was not informed during the year 1913 as to the dollars and cents business which Wagner and Schweitzer did, but I was familiar in 1913 with their business from the standpoint of the installations of lighting fixtures which they carried on in the city of Los Angeles.

Q. Now, among other factors which enter into the manufacture of lighting fixtures, one factor of some importance is the matter of available capital, is it not, Mr. Fugate?

A. I think so.

Q. You do not profess to know anything about the financial status of the Wagner-Woodruff Corporation in 1913, do you?

A. No, sir.

Q. In fact the possibility of manufacturing or producing enough units, whether it be electrical fixtures or anything else, is dependent, first of all, upon financial ability, is it not?

(Testimony of Jerome Fugate.)

A. I would say not, for if the invention has sufficient merit, I think it will attract capital.

Q. All right; now, will you tell the Board just how you arrived at the valuation which you testified was one hundred thousand dollars as at March 1, 1913?

A. I think I have already answered that question, sir.

Q. Suppose you answer it again.

A. In my answer I said that I would base that upon the ready distribution of at least one thousand units per year for the average size dealer or distributor, as the case might be, and that it would be quite possible to obtain one hundred such distribution concerns in the United States over which the patents or the right to manufacture would permit these fixtures to be distributed. [53]

Q. Well, do you know whether or not the Wagner-Woodruff corporation distributed one hundred thousand units in 1913; you do not know how many they distributed?

A. I know nothing whatever about their distribution.

Q. What do you mean by "fair market value"?

A. I would say by "fair market value" the price at which an article could be sold to a concern for the promotion or manufacture of it, and price that they would be willing and ready to pay for such a right to manufacture.

(Testimony of Jerome Fugate.)

Q. When did you first become acquainted with this Briterlite fixture?

A. In 1913.

Q. About what time in the year?

A. I came to Los Angeles in the late fall of 1912,—I think it was in October, sir, and found the Briterlite fixture being used in installations in the early spring following.

Q. Now, would you say that you saw those installations as early as the first of March of that year?

A. I would say so, yes, sir.

Q. Had you seen very many of them at that time?

A. The majority of new jobs which had been installed during the first two months of the year were of units of that type, yes, sir.

Q. What installations that you know about were made in January and February of 1913?

A. I would not be in position to name them.

Q. Which type of light was used?

A. I do not know the names.

Q. Do you remember the number?

A. The number of units installed?

Q. Not the units; the number of jobs, we will say.

A. That would be rather difficult to place at this late date, seventeen years ago.

Q. Well, you seem to recall with great definiteness the fact that there were in the two first months

(Testimony of Jerome Fugate.)

of 1913,— [54] I thought you could recall some of the jobs?

A. There are certain circumstances in our history which makes it very easily possible to trace back to that date, and that was the advent of the new lamp, which absolutely revolutionized the sale of merchandise in our industry.

Q. In 1913?

A. That came in 1912, the incandescent lamp of which I spoke I think came in in the latter part of 1911.

Q. Now, keeping out of your mind, Mr. Fugate, the information and knowledge you have at the present time with regard to this development of this Briterlite and Brascolite, and putting yourself,—placing yourself back, figuratively speaking, to on or about March 1, 1913, do I understand you to testify that you would have on that date,—you would have been willing on that date to have paid one hundred thousand dollars for the Briterlite invention?

A. I did.

Q. Now, you had become acquainted with that lighting fixture during the previous few months, had you not?

A. With that particular fixture, yes, sir.

Q. As a matter of fact that fixture was not produced before December, 1912, at the earliest, was it, so far as you know?

(Testimony of Jerome Fugate.)

A. As far as I know some place in there, the fixture made its appearance on the market, yes, sir.

Q. You knew nothing at all on March 1, 1913, about the possibility of this invention being an infringement or there being a possibility of inability to secure a patent; you knew nothing about that, did you?

A. It was generally conceded at that time that the Briterlite was being manufactured under its own patent rights,—in other words that they had secured permission to manufacture this particular fixture, and that it did not infringe upon the Brascolite which was so extensively being sold.

Q. As a matter of fact they had not secured any such rights at all March 1, 1913, had they; as a matter of fact you did not know on March 1, 1913, anything about the patentability or the possibility of securing a patent or of having the application denied, did you, as a matter of fact, you could not have known it, could you? [55]

A. The trade impression, of which I was, of course, a party was that those gentlemen had secured the right to manufacture a fixture in competition with the Brascolite, and that is the right we were speaking of, as I understand, in placing the market value upon it.

Q. I see; would you not have given this one hundred thousand dollars, if they could have assured you that you would have had exclusive privilege of manufacturing it?

(Testimony of Jerome Fugate.)

A. Will you put that question again, sir?

Q. Would you have been willing to have paid this corporation one hundred thousand dollars for that invention if there had been any doubt in your mind as to whether or not there was going to be a patent issued, or you were going to have the exclusive right to manufacture and sale,—if there had been any doubt on that point, would you have paid the one hundred thousand dollars?

A. I think that point would have had to have been cleared up, sir.

Q. All right, now, let us understand each other; this statement you made that in your opinion the fair market value of that invention on March 1, 1913, was one hundred thousand dollars, that statement is predicated, is it not, Mr. Fugate, on the assumption that the invention on that date carried with it the exclusive right to manufacture,—in other words, a patent?

A. A patent, or the fact that this invention, the idea, was patentable.

Mr. WILSON.—Yes, all right; that is all.

The MEMBER.—Any further questions?

Mr. KOSTER.—That is all.

FRANK N. COOLEY,

called as a witness by and on behalf of the taxpayer, after being duly sworn, testified as follows:

Direct Examination.

My name is Frank N. Cooley, and I reside in Los Angeles. I am at present engaged as a lighting specialist for the Graybar Electric Company, formerly the Western Electric Company, and have been in that position for the past eighteen years and four months. [56] My duties are the supervision of all lighting unit lines of lighting materials. Prior to my employment by the Graybar Electric Company I was employed in the general lighting fixture business. In 1912 and 1913 I was employed by the Western Electric Company as a lighting specialist. The Western Electric Company at that time had sixty-two houses in the United States, and today Western Electric Company have seventy-six houses, doing approximately ninety to one hundred million dollars of business during the year. I am familiar with the demands of the trade in 1912 and 1913 for an indirect lighting fixture, and during those years the demand for that type of fixture became very noticeable.

Q. What brought about the demand for that type of fixture?

A. A development of the Type-C, gas filled Mazda lamp.

Q. Just how did that bring about this demand for indirect lighting systems?

(Testimony of Frank N. Cooley.)

A. Previous to that the incandescent lamp business was confined to the carbon lamp, the filament of which was made out of carbon bamboo and gave off a rather reddish or yellow light. With the development of the gas filled lamp, the brilliancy of the filament was so much greater that it was necessary to cover the light in such way that it would not cause glare, resulting in eye-fatigue.

Q. Were you familiar with the prevailing rates at which manufacturing under patent rights were secured as they existed in 1912 and 1913?

A. I believe I am qualified in that way to a certain extent, due to the fact that I watched the development of the lighting fixture business since '99, and I worked as a mechanic for about ten years and on sales work and specialty work for the balance of twenty years.

Q. You stated that you were familiar with the demand for the indirect lighting fixtures; when did that demand first begin to show itself?

A. Immediately upon the development of the Type C lamp in 1911 or 1912. [57]

Q. Was your company selling indirect lighting fixtures at that time?

A. No, we did not sell the indirect line until probably 1913 or 1914.

Q. Assuming that you were able to purchase an invention with the exclusive rights to manufacture and sell the product covered by that invention, and that invention was of an indirect lighting fixture

(Testimony of Frank N. Cooley.)

which was superior at that time, and by "that time" I mean on or about March 1, 1913, to the other indirect lighting fixtures with which it might compete. What would you—what, in your opinion would be the fair market value of such an invention with the rights,—exclusive rights,—pertaining thereto, be as of March 1, 1913?

Mr. WILSON.—That is objected to first on the ground that the question is worded, and subject to the same criticism as has been directed to that question asked the previous witnesses; it contains first of all an assumption on the part of the witness—strike that—it contains first of all an assumption that some indirect lighting system, not described at all as the Briterlite or any other particular make, is superior, and was at that time superior, to everything else on the market, and secondly that the market value is for a thing which either is patented, or which gives exclusive rights of manufacture, which incidentally has not been shown here at all to apply to the Briterlite there, and lastly it is subject to the objection that it is so uncertain and indefinite as to be of no value whatever in the matter of arriving at a figure which might represent the fair March 1, 1913, value of the Briterlite invention. This witness has been asked, simply, "Assuming that you could purchase some patent or protected invention of an indirect lighting fixture which is superior to others,"—now there has been no testimony or evidence here tending to show at

(Testimony of Frank N. Cooley.)

any time today that this Briterlite fixture was the best on the market; as a matter of fact the record is almost barren of any testimony or evidence as to just when this article was put on the market, and in the absence of such evidence, together with the ambiguity contained in the question, the respondent urges the objection on the grounds just stated.

The MEMBER.—Objections sustained.

(By Mr. KOSTER.)

Q. Assuming that the Briterlite—

(By the MEMBER.)

Q. Just a moment; Mr. Cooley, were you familiar with this Briterlite? [58]

A. I was not at that time.

Q. Did you ever become familiar with it?

A. During the last five or six years only.

Q. In other words, you did not know the Briterlite until the last five or six years?

A. Yes.

Q. And in the last five or six years you have been familiar with it?

A. Yes.

Q. You have seen it in operation?

A. Yes, sir.

Q. And you have examined it?

A. Yes, sir.

The MEMBER.—Proceed.

(By Mr. KOSTER.)

Q. Assuming that the Briterlite invention carried with it the exclusive rights to manufacture

(Testimony of Frank N. Cooley.)

and sell the Briterlite fixture, which was a lighting fixture superior to other indirect lighting fixtures in existence on or about March 1, 1913, what in your opinion would be the fair market value as of March 1, 1913, of that Briterlite invention?

The MEMBER.—Just a moment. Have you finished your question?

Mr. KOSTER.—Yes.

Mr. WILSON.—That is subject to the same objection as heretofore made, coupled with the further objection that there has been no proper foundation laid for the question at all; the witness has not been qualified to testify to anything like that, which he is now asked to give.

Mr. KOSTER.—If the Board please, this witness has been in the lighting fixture business since '99; he has had general supervision of a lighting company which was nationally known, operating 62 stores at that time, he knew the fixture business; he knew the fixtures being developed and sold; he knew the demand for fixtures around March 1, 1913; he knew there was a demand for that indirect lighting fixture, brought about by reason of the invention and marketing of a certain new Tungsten light; he knew the prevailing rates under which rights [59] to manufacture were offered to manufacturers for patented articles; certainly if a hypothetical question can be put to him stating the facts which we believe our testimony in the case has proven, that he is qualified to give his opinion

(Testimony of Frank N. Cooley.)

as to the value of that property, based on the facts which are presented to him in the hypothetical question.

(By the MEMBER.)

Q. Do you know what lights or fixtures of the character of the Briterlite were being manufactured in 1912 and 1913?

A. Yes, I knew of the Brascolite; I knew of the Phoenix light, and I knew also of the Perfect Light, which was made in Seattle, all of the same order, having a reflecting surface back of them, and since then there has been any number of units, in the last few years, developed along those lines.

Q. Do you know of any others that were being manufactured in 1912 and 1913?

A. Those three are the only ones I know at that time.

Q. Is it possible there were some other manufacturers that you did not know about?

A. There might have been.

Q. That there were others manufactured that you did not know about?

A. Yes, there might have been.

Q. You would not want to say that those were the only kind being manufactured in 1912 and 1913?

A. No.

Mr. KOSTER.—Those assumptions which we have made in the hypothetical question, if your Honor please, we feel were supported by testimony

(Testimony of Frank N. Cooley.)

that has gone before; we submit that we should be entitled to use the facts which we believe have been proven by our testimony in the hypothetical question which we are presenting to this witness who is qualified to answer the question.

The MEMBER.—I will ask you to re-state your question now, Mr. Koster.

Mr. KOSTER.—May I have it re-read, if the Board please, by the Reporter?

(Thereupon the Reporter read the hypothetical question propounded to the witness by Mr. Koster.) [60]

The MEMBER.—Is that the question you want answered?

Mr. KOSTER.—That is the question.

The MEMBER.—Do you understand the question?

The WITNESS.—I do.

The MEMBER.—I will ask you now, can you answer that question,—I am not asking you to answer it at present; I am asking you to tell me whether you can answer it or not.

The WITNESS.—Yes.

The MEMBER.—Do you know whether or not the Briterlite was superior to the other makes of light that you state were being manufactured in 1912 and 1913, with which you were then familiar?

The WITNESS.—From information which I have had in the last five years, I believe that the Briterlite is of better design than the Brascolite

(Testimony of Frank N. Cooley.)

or other lights that I had come in contact with up to that time.

The MEMBER.—You may answer, subject to the objection of counsel for the respondent. Objection sustained. Exception granted and noted. S. J. M.

The WITNESS.—I would say a fair market value of that invention is worth about \$300,000.

(By Mr. KOSTER.)

Q. Will you state upon what you base your opinion of that value, Mr. Cooley?

A. I would base that on an estimate of possibly five thousand units in this territory, which would be approximately fifteen thousand units for the Coast, which, under our system of estimating the entire country is ten per cent of the entire country's demand for that class of stuff, and that would give about 150,000 units. From experience that I have had in attempting to market an invention, I find that the prevailing royalty basis is approximately five per cent of the manufacturing cost; the manufacturing cost of one of those units, I would say, the average cost, would be about ten dollars, which would be about fifty cents a unit, at fifty cents a unit, a million and a half units would figure around \$750,000. In my estimation, due to the fact that you have ten years of practical life of the patent,—the other seven you might be getting started and competition may come up, but by discounting that fifty per cent it still brings it down to \$375,000; that

(Testimony of Frank N. Cooley.)

is how I roughly estimate the market value of the invention. [61]

(By the MEMBER.)

Q. As of March 1, 1913?

A. Yes, because that was the time when it was very valuable; it is not now, because of all of the competition.

Mr. KOSTER.—That is all.

Cross-examination.

Giving my estimate of 150,000 units, I was referring to a distribution in 1912 or 1913. I only knew from information which has been given me as to when the Briterlite was first put on the market and could not of my own knowledge testify that it was on the market on March 1, 1913. My opinion of a \$300,000.00 fair market value as of March 1, 1913, is based upon a unit that was superior to the present indirect units on the market, as I know the Briterlite today. When I use the word "unit" I mean a lighting fixture and a lighting fixture is commonly called a lighting unit. In giving my opinion as to value, I took into account the privilege of exclusive manufacture of a patented invention or one whose patent was assured.

Q. If there had been on March 1, 1913, any doubt as to the possibility of securing patent, or if at that time no application for patent had ever been filed, would that make any difference in the valuation, in your opinion?

(Testimony of Frank N. Cooley.)

A. Yes, sir, I should want to be assured of the exclusive right to manufacture.

(By the MEMBER.)

Q. Now, the value you gave is your opinion of the value as of March 1, 1913, is that right?

A. Yes, your Honor.

Q. And you assume that the article that was described to you was being manufactured on or about March 1, 1913?

A. Yes, your Honor.

Q. And did you give your opinion of the value in the [62] light of conditions that existed on March 1, 1913, in this line of business?

A. Yes, your Honor.

Mr. WILSON.—That is all.

Mr. KOSTER.—That is all.

It was stipulated by and between counsel for the parties that the application for patent covering the Briterlite fixture was filed some time during the year 1914 and that the patent was thereafter duly granted on or about September 21, 1915.

The initials "S. J. M." appearing in the above rulings upon motions and objections are those of Stephen J. McMahon, Member of the United States Board of Tax Appeals, who heard the proceedings, and wrote the report of the Board, consisting of the Findings of Fact and Opinion, Promulgated June 26, 1931.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by C. M. Charest, General Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned as attorney for the petitioner on review.

GEORGE H. KOSTER,
Attorney for Petitioner on Review. [63]

The foregoing evidence is all of the material evidence adduced at the hearing, and in order that the same may be preserved and made a part of this record, this statement of evidence is duly approved and settled thisday of....., A. D. 1932.

.....
Member,
United States Board of Tax Appeals.

Approved and ordered filed this 27th day of July, 1932.

LOGAN MORRIS,
Member.

[Endorsed]: Filed July 27, 1932. [64]

[Title of Court and Cause.]

NOTICE OF LODGMENT OF STATEMENT
AND OF FILING OF PRAECIPE.

To:

C. M. Charest, General Counsel,
Bureau of Internal Revenue,
Washington, D. C.,
Attorney for respondent on review.

Notice is hereby given you that Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased, petitioner on review in the above entitled proceeding, did on the 12th day of February, 1932, file with the Clerk of the United States Board of Tax Appeals, Washington, D. C., a praecipe for record herein, a copy of which said praecipe as filed is herewith served upon you.

Notice is also hereby given you that the petitioner on review lodged with the Board of Tax Appeals on the 12th day of Feb., 1932, a proposed Statement of Evidence herein, a copy of which said Statement of Evidence as filed is herewith served upon you.

You are hereby further notified that the petitioner on review will present this statement of evidence for settlement and [66] approval by the United States Board of Tax Appeals at 9:30 o'clock A. M., Feb. 24th, 1932.

CLAUDE I. PARKER,
GEORGE H. KOSTER,

Counsel for Petitioner on Review.

JOHN B. MILLIKEN,
L. A. LUCE,
Of Counsel.

Service of the foregoing notice and of copies of the praecipe for record and statement of evidence mentioned in said notice is acknowledged this 12th day of Feb., 1932.

C. M. CHAREST,

Attorney for Respondent on Review.

[Endorsed]: Filed Feb. 12, 1932. [67]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies, duly certified as correct, of the following documents and records in the above entitled proceeding in connection with the petition for review by the said United States Circuit Court of Appeals for the Ninth Circuit heretofore filed by the petitioner on review:

1. Docket entries of proceedings before the Board, Docket No. 32,981.

2. Pleadings before the Board in Docket No. 32,981, including:

- (a) Petition with exhibits attached thereto;
- (b) Commissioner's answer to petition;
- (c) Findings of fact and opinion promulgated by the Board June 26, 1931;

(d) Decision of the Board entered June 29, 1931;

(e) Petitioner's Exhibit No. 1.

3. Petition for Review, together with proof of notice of filing same.

4. Supersedeas Bond (not included in record).
[68]

5. Statement of Evidence as finally agreed upon or approved.

6. Notice of lodgment of Statement of Evidence and filing of Praecipe and proof of service.

7. This praecipe.

CLAUDE I. PARKER,
GEORGE H. KOSTER,
Attorneys for Petitioner
on Review.

JOHN B. MILLIKEN,
L. A. LUCE,
Of Counsel.

[Endorsed]: Filed Feb. 12, 1932. [69]

[Title of Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 69, inclusive, contain and are a true

copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 5th day of August, 1932.

[Seal]

B. D. GAMBLE,

Clerk,

United States Board of Tax Appeals.

[Endorsed]: No. 6951. United States Circuit Court of Appeals for the Ninth Circuit. Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed August 24, 1932.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 6951

ALMA I. WAGNER, Executrix of the Estate of
Robert G. Wagner, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED ASSIGNMENTS OF ERROR.

The petitioner submits that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of petitioner, and the petitioner assigns the following errors, and each of them, which she avers occurred in said record, proceedings, decision and final order of redetermination and upon which she relies to reverse the said decision and final order of redetermination so rendered and entered by said Board of Tax Appeals, to-wit:

I.

The Board of Tax Appeals erred in holding that the Briterlite invention had no fair market price

or value on March 1, 1913, since such conclusion is not supported by the evidence.

II.

The Board of Tax Appeals erred in holding and finding that no competent evidence was introduced to prove that said invention had a fair market price or value on March 1, 1913, there being evidence to the contrary in the record and from the testimony of the witnesses.

III.

The Board of Tax Appeals erred in not redetermining the deficiency in favor of the petitioner for the year 1930 and against the Commissioner for the year 1920.

IV.

The Board of Tax Appeals erred in sustaining the objections of counsel for respondent to the admission in evidence of the testimony of the witness Ernest J. Schweitzer, co-inventor with Robert G. Wagner of the Briterlite invention, concerning the fair market value on March 1, 1913, of said Briterlite invention.

The witness had testified that he resided in Los Angeles and had been engaged in the manufacture of lighting fixtures for the past eighteen years and was engaged in such business during 1912 and 1913; that during 1912 and 1913 he was also engaged in the manufacture of a lighting fixture called Briter-

lite; that he became interested in the development of the Briterlite in 1912 after he and Wagner had observed how successful the Brascolite had become; that in their opinion the glare of a new gas light on the market was a very bad feature and to reduce same they desired to get out their patent with respect to the convex and concave reflector, also with side hooks, on the Briterlite, which was different from the Brascolite; that he and Wagner manufactured for sale the Briterlite during 1912 and 1913 and for subsequent years; that they manufactured about eight different sizes during 1912 and 1913, and the best seller during those years sold for \$18.00 to \$20.00; that they arrived at the sales price by taking cost and overhead and doubling the resulting figure; that he and Wagner each owned a one-half interest in the Briterlite and they sold their interest to the Wagner-Woodruff Company for the sum of \$85,000.00; that there was a big demand for the indirect lighting system in 1912 and 1913 because the nitrogen lamp had just come out and made it so bright against the Tungsten lamps that it gave a big opening for the indirect lighting unit.

Further testimony of the witness, objections of counsel for respondent, and the ruling of the Board Member will more fully appear as follows:

The MEMBER.—Will you now restate your question that you want him to answer?

Mr. KOSTER.—What, in your opinion, was the fair market value on March 1, 1913, of your

Briterlite invention, and the exclusive right to manufacture and sell that lighting fixture known as Briterlite?

The MEMBER.—Just a moment; you may restate your objection to this question, Mr. Wilson.

Mr. WILSON.—The objection by the Respondent to the question is predicated first upon the insufficiency of evidence thus far adduced from this witness to establish any first-hand knowledge on his part as to those facts which enter into any opinion or expert testimony as to the extent to which the invention in question was in production or had been put in production or was on the market. Secondly the absence of any evidence which shows that this witness had any knowledge of the value,—that is the fair market value as of March 1, 1913, of the so-called Briterlite patents, upon which invention this witness' testimony has thus far been predicated. In other words the testimony thus far has been a comparison of the success and extent of marketing the so-called Briterlite lighting fixture and the so-called Briterlite fixture which was the invention of the petitioner and the witness.

The respondent submits that the testimony has shown the witness to be a man engaged in the general lighting fixture business over a period of only about one year prior to the basic date, and to be possessed only of a very general

knowledge regarding the nature of the so-called Brascolite fixtures, or the extent to which it was on the market, and summarizing, the record is barren of sufficient proof or evidence to show, first, that the Briterlite fixture was even on the market, or if so, to what extent, and of any other and all other features which necessarily go to make up and constitute qualification to testify as an expert.

The MEMBER.—What have you to say, Mr. Koster?

Mr. KOSTER.—If the Board please, this witness has testified that he knew all of the factors that entered into the question of the value of this particular invention; he knew the demand for types of fixtures similar to the Briterlite; he knew what the Briterlite cost him to make; he knew what it would sell for; he knew the profit he could be expected to make on it; he knew the demand, as I say; he invented the product; his testimony is that he has been in the lighting fixture business for the last eighteen years; I believe he is qualified to testify as to the March 1, 1913, value of that invention, and the rights under that invention; as to comparisons with the Brascolite, we compared it to show reasons for expectation of demand, and also the fact that the competition was very limited. This witness can not be expected to know what the sale, or what the profit being realized by the Brascolite people was, or

what their valuation of any patent rights they might have would be; he is valuing just his own fixture,—the Briterlite.

Mr. WILSON.—If the respondent be permitted to use an illustration which may perhaps clarify the position taken by the respondent, if, for the sake of argument we leave the subject of lighting fixtures and use automobiles, as an illustration. Now, it is equally true that the automobile was being developed in these earlier years, back in 1911, 1912 and prior thereto, the same as lighting fixtures were being modernized each year. Now, assuming that a witness testifies on direct examination that he was personally aware of the fact in 1911 and 1912 and perhaps for years prior thereto, that the automobile was making great headway all over the country,—it was a matter of general common knowledge and undisputed, several different kinds of makes of automobiles, all a little different, of course, but the general increasing in sales each year, the general public taking them up more as time passes. Now, he answers this question, being asked with regard to other makes of automobiles than the one he has worked on and invented,—he is asked if he is in a position to give a figure which would be representative of the fair market value of one of these other makes of automobiles as of March 1, 1913, and he says no; then by what possible reasoning could it be concluded that

such a witness would be reliable to testify as to what the fair market value of March 1, 1913, would be of his automobile, if he is unfamiliar with the very machines which he has used as a comparison to arrive at an opinion that there was any value; if his knowledge is not such as to be able to give any kind of a figure representing the value of the comparisons, then how can he possibly do so as to his own, your Honor, particularly where the invention of the petitioner was newer, and thus far has not been shown to be on the market at all, except as Mr. Lyon testified, near the conclusion of his testimony, that he thought there had been one commercial installation prior to the summer of 1913, and the only other testimony has to do with what one certain unit brought, without any supplemental testimony as to the extent to which those units were sold.

The MEMBER.—Have you any authorities in support of your contention, Mr. Koster, that this proof is admissible?

Mr. KOSTER.—I do not have them here, if the Board please, but I would be glad to submit a brief on the question later on.

The MEMBER.—I will take this answer subject to the objection, and I will rule on the admissibility of the proof finally as the case is disposed of,—I will reserve an exception in favor of the party against whom that ruling may go, and I want to say now that I am im-

pressed,—I want to say that, in fairness to counsel for the taxpayer, I am impressed that this is not admissible—that this witness has not been qualified as an expert on this subject, and I would like to have this question of the admissibility of this proof, or any proof of this character set out properly in any briefs that you may submit. I would like to have the authorities cited. Objection sustained. Exception granted and noted. S. J. M. (Tr. pp. 42 to 46.)

Thereafter the witness was permitted to continue his testimony as follows:

The MEMBER.—He may answer the question.

Mr. KOSTER.—Can you find the question, Mr. Reporter?

(The pending question was thereupon read by the Reporter, as follows):

Q. What, in your opinion, was the fair market value on March 1, 1913, of your Briterlite invention and the exclusive right to manufacture and sell that lighting fixture known as “Briterlite”?

The MEMBER.—If you know, or rather, if you can answer that question. Do you understand the question?

The WITNESS.—Yes, sir.

The MEMBER.—Can you answer it?

The WITNESS.—I put my value on it at that time; is that what you want, Judge?

The MEMBER.—No, that is not the question; just read the question again.

(The pending question was thereupon again read by the Reporter.)

The MEMBER.—Now, you see, that asked about what the market value was of the property described in the question. Now, the first question I am going to ask you this, is whether or not you know what the market value of this invention was,—these rights set forth in the question,—we are not talking about what you think it was worth,—the question is what the market value was, now, do you know?

The WITNESS.—Well, I could not answer that that way, Judge, because we put a price on the Briterlite at one hundred thousand dollars.

The MEMBER.—Then, that is just your own value?

The WITNESS.—Mr. Wagner and I.

The MEMBER.—Now, that is your own value; that is not the question, then, of what the market value was, is it?

The WITNESS.—Well, we never put it on the market for sale.

The MEMBER.—So you do not know what the market value of those patents was, is that true—those inventions?

The WITNESS.—It might have been the same as the Brascolite; the Brascolite made three million dollars and perhaps more.

The MEMBER.—Just answer my question. You say this value of one hundred thousand dollars is the value that you and your associate Mr. Wagner fixed?

The WITNESS.—Yes, sir.

The MEMBER.—That is what you thought it was worth?

The WITNESS.—Yes, sir.

The MEMBER.—But you did not know,—you did not take into consideration in fixing that value as to what the market value of the invention and the rights were, is that right?

The WITNESS.—We did not have it up for sale, no.

The MEMBER.—So this figure of one hundred thousand dollars is your own estimate and that of Mr. Wagner?

The WITNESS.—Yes, sir.

The MEMBER.—Of what this invention and these rights were worth, as of March 1, 1913, is that right?

The WITNESS.—Yes, sir.

Mr. KOSTER.—That concludes the direct examination, your Honor.

The MEMBER.—I will let the answer stand subject to the objection, and with the understanding I will pass upon the question whether or not it should be received, and I will rule upon it when I dispose of the case; what I said about the brief on the subject applies to this answer as well as any other answer that was

given on that subject. Objection sustained. Exception granted and noted. S. J. M. (Tr. pp. 48-50.)

(When the statement of evidence was finally settled the Board Member added the following notation, as appears on page 87 of the printed transcript of record: "The initials 'S. J. M.' appearing in the above rulings upon motions and objections are those of Stephen J. McMahon, Member of the United States Board of Tax Appeals, who heard the proceedings, and wrote the report of the Board, consisting of the Findings of Fact and Opinion, Promulgated June 26, 1931.")

V.

The Board of Tax Appeals erred in rejecting as evidence the testimony of the witness Ernest J. Schweitzer, concerning his opinion, as owner of the invention, of the fair market value on March 1, 1913, of the Briterlite invention.

The witness had been asked:

"What, in your opinion, was the fair market value on March 1, 1913, of your Briterlite invention, and the exclusive right to manufacture and sell that lighting fixture known as Briterlite?"

Counsel for respondent objected and the Member sustained the objection on the ground that the witness was not qualified as an expert. The following then took place:

Mr. KOSTER.—I presume there is no objection to the answer being made as to the value placed upon the product by the owner; in other words, this question I am asking this witness as to value he placed upon an invention and the right which he, himself owned, could be answered by him as an owner.

The MEMBER.—I think there is a very serious question about that, where it does not appear that he is conversant with the values; it does not appear that he knows if there is a market or was a market as of that date for this article,—I mean now, of the invention,—I am not talking now of the manufactured product—I think there is a serious question about the admissibility of his opinion on that question,—I mean on the subject of the value of the invention as of that date.

Mr. KOSTER.—And the rights under the invention.

The MEMBER.—Yes; the mere fact that a man has made an invention, and owns an invention, it does not follow from that he is in position to give an opinion—an expert opinion as to the value of those inventions—that is something for the Board to pass upon, and it is a question whether or not an opinion of a man who has not been shown to know something about the market value as of a certain date,—it is a question whether his opinion would be of any value to the Board.

Mr. WILSON.—Yes, your Honor.

Mr. KOSTER.—It is a question of the weight of his opinion.

The MEMBER.—No, it is a question now whether his opinion is admissible at all. I want to hear you in the brief fully on that subject.

Mr. KOSTER.—All right.

The MEMBER.—He may answer the question. (Tr. pp. 46 to 48.)

The witness then testified, upon interrogation by the Board Member, that the value placed on the Briterlite invention by him and Mr. Wagner on March 1, 1913, was \$100,000.00. The Member then ruled:

The MEMBER.—I will let the answer stand subject to the objection, and with the understanding I will pass upon the question whether or not it should be received, and I will rule upon it when I dispose of the case; what I said about the brief on the subject applies to this answer as well as any other answer that was given on that subject. Objection sustained. Exception granted and noted. S. J. M. (Tr. p. 50.)

VI.

The Board of Tax Appeals erred in sustaining the objection of counsel for respondent to the admission in evidence of the testimony of the witness George J. McKenzie, concerning the compara-

tive values of the Briterlite invention in 1913 and in 1920.

The witness had testified that he was a resident of Los Angeles and was manager of the Wagner-Woodruff Company and had been connected with that company for the past eighteen or nineteen years; that the company was engaged in the manufacture of lighting fixtures; that he was with the company in the years 1912 and 1913, and the company began the manufacture of the Briterlite fixture in the year 1912; that the Briterlite fixture is a semi-indirect type of lighting fixture—that is, a glass bowl below, an opaque upper reflector; a curved reflecting surface, and the upper reflector was what might be called a concave reflector; that there was one other type of fixture that resembled the Briterlite, known as the Brascolite; that it was similar inasmuch as it had an upper reflector with a translucent bowl, but the opaque top reflector had a perfectly flat reflecting surface as against the concave by the Briterlite, and the upper reflector of the Briterlite was stepped down in such manner as to eliminate any shadow upon the ceiling where the fixture was used as a ceiling type; that the bowl on the Briterlite was suspended from the outside of the reflector, against the Brascolite being suspended probably about two inches from the edge of the reflector, the feature of the Briterlite over the Brascolite pertaining to that method of suspension of the bowl, was that it allowed the bowl to be removed more readily for

cleaning of the bowl and renewing the lamp; that there was a tremendous demand for this type of fixture in the commercial world, because at that time the National Lamp Works, who practically controlled the distribution of electric lamps, changed their type of lamp to what is known as the nitrogen or gas-filled bulb, which was such a pure white glaring light that it was absolutely essential that it be covered in some way as it was blinding to look at the actual bulb of the lamp, and everybody that was manufacturing lighting fixtures was attempting in some way to develop something that would eliminate that glare and make the fixture livable; that up to that time all fixtures with possibly one or two exceptions were what were called direct light fixtures—direct reflector, with possibly multiple reflectors,—anywhere from three to ten to a fixture, with the lamp exposed, because the carbon or Tungsten lamps were in use, which had more of a reddish yellow case to them and were not objectionable to look at; that the other type of fixture which was on the market and had been marketed successfully was known as the Finish (Phoenix) Light, which had a similar principle except it was all glass—the upper reflector as well as the lower were glass; that those were the only two fixtures that were developed and marketed, to the witness's knowledge, to any great extent; that the retail selling price of the Briterlite during the years 1912 and 1913 was based on the cost of the labor and material as a basic cost of

the fixtures and fifty per cent of such basic cost was added to determine the overhead, and the retail price was determined by doubling both amounts; that the public and trade demand for the indirect lighting fixtures, such as the Briterlite and Brascolite, was very great during the years 1912 and 1913 and was much greater in those years than during the year 1920 when new patents were developed which made the cost of installation of the new type much cheaper and had a much greater utility value than did the Briterlite or the Brascolite; that the Briterlite invention and patent was acquired by Wagner and Woodruff during the year 1920. The witness testified that he sold fixtures during the year 1911, and for seven years prior to that he was in charge of the silverware department and lamp department of D. C. Percival and Company, wholesale jewelers; that he was familiar with the demands for indirect lighting fixtures in 1912 and 1913, and was familiar with the rate of profit resulting from the manufacture and sale of the Briterlite fixtures during the years 1912 and 1913.

Further testimony of the witness, objections of counsel for respondent, and the ruling of the Board Member will more fully appear as follows:

Mr. KOSTER.—What would you say would be the comparison of values of the Briterlite invention and the exclusive rights to manufacture and sell thereunder as between 1920 and 1913?

Mr. WILSON.—That is objected to, your Honor; it is wholly immaterial; we are not concerned with any 1920 value,—it is wholly immaterial whatever value this invention increased or decreased after 1913, we are not concerned, nor does the disposition of this case in any wise hinge upon 1920 value,—it was sold in 1920 for an estimated figure of eighty-five thousand dollars, that is not in dispute what it was sold for in 1920.

Mr. KOSTER.—If that fixture had a value of eighty-five thousand in the year 1920 and this witness can testify as to conditions existing between those times and at those times and can compare the values as he sees them in 1920 and 1913, I should think that that would be admissible, at least for a comparison with values existing between those two dates, or at those two dates.

Mr. WILSON.—Well, in answer to that statement, your Honor, I would suggest this: This witness has been asked right from the start of his examination concerning the first types of lighting fixtures, and then he explained in some detail how the demand for indirect lighting fixtures grew and explained briefly the difference between the Brascolite and the Briterlite, and testified that he was familiar with the demand for indirect lighting in 1912 and 1913; now, every word of that testimony goes to lighting fixtures we are concerned here with

a certain property right, namely an invention; we are not concerned here with value of fixtures as merchandise; we are concerned here with fair market value of a property right, namely value of an invention as of March 1, 1913; I submit the witness has not been qualified to testify at all either as to a figure representing the fair market value at March 1, 1913, or a comparative figure—you can not compare a value or fixture with the value of an invention; they are altogether different rights and property.

The MEMBER.—Read the last question, Mr. Reporter.

(The pending question was thereupon read by the Reporter.)

The MEMBER.—He may answer.

Mr. WILSON.—May I have an exception?

The MEMBER.—Exception noted.

Mr. KOSTER.—Will you read that question a little louder, Mr. Reporter?

(The pending question was thereupon read by the Reporter.)

The WITNESS.—I do not quite understand that question; who is putting this question?

Mr. KOSTER.—This is the question that was asked you before you were interrupted in your answer.

The MEMBER.—You may re-state the question to the witness; he says he does not understand it.

(By Mr. KOSTER.)

Q. Will you state whether or not the value of the Briterlite invention and the exclusive rights to manufacture and sell thereunder were greater or less in 1920 than in 1913 and 1912?

A. They were less in 1920 than in 1912; is that the question?

The MEMBER.—Now, do you object to this question and answer?

Mr. WILSON.—Yes, sir, on the grounds heretofore stated, your Honor.

The MEMBER.—You move to strike it out?

Mr. WILSON.—Yes, I move to strike it out.

The MEMBER.—The answer will be allowed to stand, subject to the objection and the motion, and the question of admissibility will be disposed of at the time of the decision in the case, and the exception will be reserved for the party against whom the ruling may go. The objection is sustained. The motion is granted. Exceptions are granted and noted. S. J. M.

(Tr. pp. 54 to 57.)

VII.

The Board of Tax Appeals erred in sustaining the objection of counsel for respondent to the admission in evidence of the testimony of the witness Max L. Gordon, concerning the fair market value on March 1, 1913, of the Briterlite invention.

The witness had testified that he was a resident of Los Angeles, and had been engaged in the light-

ing fixture business and was one of the owners of the California Fixture Company from 1909 to 1912, and the owner of the National Fixture Company from 1912 to 1925; that prior to 1909 he was also engaged in the lighting fixture business and had been in that business practically all his life; that he was familiar with the type of lighting fixtures in use during the years 1912 and 1913; that he sold the Brascolite fixture quite extensively in his business, and was also engaged in the manufacturing of lighting fixtures and was familiar with the cost of manufacturing lighting fixtures; that he was familiar with the demand for lighting fixtures, particularly in California, and the company with which he was connected had three traveling salesmen that canvassed the lighting fixture trade all over the country; that the general method for arriving at list price—sales price for fixtures—which method prevailed in the fixture business during the years 1912 and 1913, was to take the cost of material plus the labor, add fifty per cent for general overhead, shop expense, and so on, and double that cost; that he knew the Briterlite was being manufactured and sold in 1913; that he knew the light, and would liked to have had the privilege of selling the Briterlite; that he knew the selling price and the cost of manufacture of the Briterlite fixture; that the Briterlite fixture was superior to the Brascolite fixture in 1913 and could be readily sold in competition with the Brascolite.

Further testimony of the witness, objections of counsel for the respondent, and the ruling of the Board Member will more fully appear as follows:

Mr. KOSTER.—What, in your opinion, was the fair market value as of March 1, 1913, of the Briterlite invention and the exclusive right to manufacture and sell under that particular invention?

The MEMBER.—What is your objection; what are the grounds for the objection?

Mr. WILSON.—The witness is now asked to answer a question regarding the fair market value of a certain property right, namely an invention. This witness has testified, as your Honor has heard, the length of time he has been in business, the nature of that business; he has testified he was familiar with this Briterlite fixture; he has not said anything about the invention as a property right; he has been talking about the Briterlite fixture, in answer to my questions a moment ago he stated that his firm had never sold the Briterlite, because they could not; that he was familiar with the fixtures and knew that it was in production and recognized it, that is, the company, as a competitor. Now, nowhere, either in that examination or in the witness' direct examination has there been a word stated about the invention property right, the fair market value of which is here now being sought to be established; the witness is wholly unqualified

thus far to give any testimony in regard to the value of the invention—the property right.

The MEMBER.—Do you understand the question that is before you now?

The WITNESS.—Yes, sir.

The MEMBER.—You may answer, subject as to this value?

A. I can.

Q. You say you can?

A. I can.

The MEMBER.—You may answer, subject to the objection of counsel for the respondent. Objection sustained. Exception granted and noted. S. J. M.

(Tr. pp. 61, 62.)

The witness then testified that the fair market value of the Briterlite invention on March 1, 1913, was \$100,000.00. He then testified as to the basis used by him in determining this value as follows:

Mr. KOSTER.—Upon what, I will ask you, would you base that opinion of value, Mr. Gordon?

A. We were selling, starting in from about 1913, about 3,000 National lights a year, and there was no comparison, as far as the National Light and Briterlite was concerned in appearance, because, for the reason, I would safely say, and will readily make this statement, when we would submit both samples on some particular contract, and invariably the Brascolite

would win; the exception in that case was the Rosslyn Hotel, we happened to win, but in most cases the Brascolite, it was easier to clean——

Q. Are you referring to Brascolite?

A. I am referring to the Briterlite; it was easier to clean, to detach a bowl from the plate, and it was a better looking fixture than ours; of course, we are out of business now.

Q. What factors did you use in computing your value of seventy-five to one hundred thousand dollars?

A. Well, I would have been willing to pay a dollar per unit as a royalty, if I could have got the exclusive right to it, even for California on account of so many new and old constructions going on on buildings, and so on.

Q. What was your estimate of the number of units that might be sold under the right?

A. I would safely say ten thousand a year.

Q. For what period of years?

A. Well, the economic life of a thing of that kind, I would say ten years.

Q. Then, what would you do,—I am trying to find out——

A. Well, we would still sell it, I, as a manufacturer, would take advantage of it, if I would pay the seventy-five thousand, would take advantage of the rest of the time for myself, as additional profit; if I were to sell 500, I

would consider that 500 as additional profit to my concern.

Q. Now, in arriving at the value you place upon this, what other factors do you use, and how do you apply those factors; you have stated now the number of units you estimated would be sold, the royalty rate; just explain how you compute your value.

A. What do you mean by "value"?

Q. You stated the value was seventy-five to one hundred thousand dollars?

A. Yes, I estimate the value so many fixtures a year,—say ten thousand a year, at a dollar per fixture, is ten thousand dollars; if I could buy that patent for seventy-five thousand, why I would think it would be a good investment, and that would be, when I say seventy-five thousand, I refer to the Pacific Coast alone,—my experience,—I have not sold any fixtures back east until 1923, then I had three men on the road.

(Tr. pp. 63 to 65.)

VIII.

The Board of Tax Appeals erred in sustaining the objection of counsel for the respondent to the admission in evidence of the testimony of the witness Jerome Fugate, concerning the fair market value on March 1, 1913, of the Briterlite invention.

The witness had testified he resided in Los Angeles and was at that time a partner in the Wagner-

Woodruff Company and had been a partner for the past three years; that prior to that time he was associated with the Myberg Company of Los Angeles in the capacity of selling their product and had been employed by that company about seven years; that prior to that time he was in the business of designing and manufacturing lighting fixtures for himself at Tacoma, Washington, and prior to that time he was manager of the Mullins Electric Supply Company at Tacoma, Washington; that during the years 1912 and 1913 he was associated as a salesman with the W. G. Hudson Company of Los Angeles, selling lighting fixtures, and during the years 1909, 1910, 1911 and 1912 he was with the Capital Electric Company of Salt Lake City, which company was engaged in the designing, manufacturing and distribution of lighting fixtures and supplies; that he was traveling auditor of the Capital Electric Company, which was a very large concern and conducted a very extensive jobbing and manufacturing business; that he was familiar with the types of lighting fixtures in existence in 1912 and 1913; that the Brascolite fixture was by far the best know fixture, and following that came the Briterlite fixture manufactured in Los Angeles and then the Phoenix light; that the Briterlite could easily be sold in competition with the Brascolite because of the superior features which it had from a selling standpoint.

Further testimony of the witness, objections of counsel for the respondent, and the ruling of the Board Member will more fully appear as follows:

Mr. KOSTER.—Assuming that you had, or that you could purchase at March 1, 1913, or thereabouts, a right, a patent or an invention, together with the exclusive right to manufacture and sell that patent or invention covering a lighting fixture, which was superior to Brascolite at that time; what would you consider, or what in your opinion would be the fair market value of a product (property) at that time, of the product (property) that was being offered to you for sale or for purchase?

Mr. WILSON.—That is objected to, your Honor, for the reasons which certainly must be obvious; in the first place the question is predicated upon the assumption that the Briterlite invention was, in fact, superior to any other product, namely Brascolite, concerning which we know absolutely nothing. In other words, the answer, even if given,—even if an answer were made here would most certainly be subject to a motion to strike on the ground that it is wholly incompetent, irrelevant and immaterial. The second ground of the objection is that the question assumes the value of a certain property right which is patented. Now, the evidence in this case clearly shows that this invention was not patented on March 1, 1913, at

all, the application was not made until in 1914 and the patent issued in 1915, so that the hypothetical question does not cover the facts thus far developed in this case.

The MEMBER.—In the first place, did you understand the question?

The WITNESS.—I think I do, sir.

The MEMBER.—Do you want it read again?

The WITNESS.—I would prefer to have it read again.

The MEMBER.—Read the question.

(The pending question was thereupon read by the Reporter.)

The MEMBER.—In the first place, can you answer that question; that is something you can answer yes or no; I am asking you if you can answer that question; I would like to have you answer yes or no.

The WITNESS.—Yes, sir.

The MEMBER.—You can answer that question?

The WITNESS.—I think so.

The MEMBER.—The answer will be taken, subject to the objection. Objection sustained. Exception granted and noted. S. J. M.

(Tr. pp. 69, 70.)

The witness then testified that the fair market value of the Briterlite invention on March 1, 1913, would have been at a minimum \$100,000.00, as follows:

The WITNESS.—Well, I would first, of course, have to base the value of such a right to manufacture on what the supply and demand for the product in question would be. The only thing I would have to base such an estimated value upon would be, naturally, upon my knowledge of the distribution possibilities, based on past experience of a similar type fixture in the United States, in general, distribution possibilities, in other words. I would say that in my experience with the Capital Electric Company of Salt Lake City, where we operated this chain of twenty-one stores, that I made reference to using that as a basis; the average sales of those institutions ran very close to ten thousand a month; they were not large institutions,—about half of their sales were based upon commercial fixtures,—store lighting fixtures,—office building fixtures, and so on. This Brascolite had absolutely been the only unit that could be sold in this territory; coming into Los Angeles, I found the Briterlite invention here in use and it offered a highly competitive fixture which could readily be sold in competition with the Brascolite, and it would have been little or no problem whatever for any manufacturer to have easily reached a distribution of one hundred thousand units per year in the United States. I would base that upon the averages of sales for an average store,—an average institution running around

one thousand units per year; it would not be very difficult to obtain one hundred of such distributing points in this country; I would say a very fair market value for the privilege of manufacturing such a fixture would have been, at a minimum, one hundred thousand dollars. (Tr. p. 71.)

Upon cross-examination the witness testified as follows:

Mr. WILSON.—Now, keeping out of your mind, Mr. Fugate, the information and knowledge you have at the present time with regard to this development of this Briterlite and Brascolite, and putting yourself,—placing yourself back, figuratively speaking, to on or about March 1, 1913, do I understand you to testify that you would have on that date,—you would have been willing on that date to have paid one hundred thousand dollars for the Briterlite invention?

A. I did. (Tr. p. 75.)

IX.

The Board of Tax Appeals erred in sustaining the objection of counsel for the respondent to the admission in evidence of the testimony of the witness Frank N. Cooley, concerning the fair market value on March 1, 1913, of the Briterlite invention.

The witness had testified that he resided in Los Angeles and was at that time engaged as a lighting specialist for the Graybar Electric Company,

formerly the Western Electric Company, and had been in that position for the past eighteen years and four months, supervising all lighting unit lines of lighting materials; that prior to that time he was employed in the general lighting fixture business; that in 1912 and 1913 he was employed by the Western Electric Company as a lighting specialist; that at that time the Western Electric Company had sixty-two houses in the United States, and at the present time have seventy-six houses, doing approximately ninety to one hundred million dollars of business during the year; that he was familiar with the demands of the trade in 1912 and 1913 for an indirect lighting fixture, and that during those years the demand for that type of fixture became very noticeable; that that demand came about by reason of the development of the Type-C, gas filled Mazda lamp; that previous to that the incandescent lamp business was confined to the carbon lamp, the filament of which was made out of carbon bamboo and gave off a rather reddish or yellow light, but with the development of the gas filled lamp, the brilliancy of the filament was so much greater that it was necessary to cover the light in such a way that it would not cause glare, resulting in eye-fatigue; that he knew the prevailing rates at which manufacturing under patent rights were secured in 1912 and 1913, due to the fact that he had watched the development of the lighting fixture business since 1899 and worked for about ten years on sales work and specialty

work for the balance of twenty years; that the demand for the indirect lighting fixtures began to develop in 1911 or 1912; that his company did not start selling the indirect line until about 1913 or 1914.

Further testimony of the witness, objections of counsel for the respondent, and the ruling of the Board Member will more fully appear as follows:

Mr. KOSTER.—Assuming that you were able to purchase an invention with the exclusive rights to manufacture and sell the product covered by that invention, and that invention was of an indirect lighting fixture which was superior at that time, and by “that time” I mean on or about March 1, 1913, to the other indirect lighting fixtures with which it might compete. What would you—what, in your opinion would be the fair market value of such an invention with the rights,—exclusive rights, pertaining thereto, be as of March 1, 1913?

Mr. WILSON.—That is objected to first on the ground that the question is worded, and subject to the same criticism as has been directed to that question asked the previous witnesses; it contains first of all an assumption on the part of the witness—strike that—it contains first of all an assumption that some indirect lighting system, not described at all as the Briterlite or any other particular make, is superior, and was at that time superior, to everything else on the market, and secondly

that the market value is for a thing which either is patented, or which gives exclusive rights of manufacture, which incidentally has not been shown here at all to apply to the Briterlite there, and lastly it is subject to the objection that it is so uncertain and indefinite as to be of no value whatever in the matter of arriving at a figure which might represent the fair March 1, 1913, value of the Briterlite invention. This witness has been asked, simply, "Assuming that you could purchase some patent or protected invention of an indirect lighting fixture which is superior to others,"—now there has been no testimony or evidence here tending to show at any time today that this Briterlite fixture was the best on the market; as a matter of fact the record is almost barren of any testimony or evidence as to just when this article was put on the market, and in the absence of such evidence, together with the ambiguity contained in the question, the respondent urges the objection on the grounds just stated.

The MEMBER.—Objections sustained.

(By Mr. KOSTER.)

Q. Assuming that the Briterlite—

(By the MEMBER.)

Q. Just a moment; Mr. Cooley, were you familiar with this Briterlite?

A. I was not at that time.

Q. Did you ever become familiar with it?

A. During the last five or six years only.

Q. In other words, you did not know the Briterlite until the last five or six years?

A. Yes.

Q. And in the last five or six years you have been familiar with it?

A. Yes.

Q. You have seen it in operation?

A. Yes, sir.

Q. And you have examined it?

A. Yes, sir.

The MEMBER.—Proceed.

(By Mr. KOSTER.)

Q. Assuming that the Briterlite invention carried with it the exclusive rights to manufacture and sell the Briterlite fixture, which was a lighting fixture superior to other indirect lighting fixtures in existence on or about March 1, 1913, what in your opinion would be the fair market value as of March 1, 1913, of that Briterlite invention?

The MEMBER.—Just a moment. Have you finished your question?

Mr. KOSTER.—Yes.

Mr. WILSON.—That is subject to the same objection as heretofore made, coupled with the further objection that there has been no proper foundation laid for the question at all; the witness has not been qualified to testify to anything like that, which he is now asked to give.

Mr. KOSTER.—If the Board please, this witness has been in the lighting fixture business since '99; he has had general supervision of a lighting company which was nationally known, operating 62 stores at that time, he knew the fixture business; he knew the fixtures being developed and sold; he knew the demand for fixtures around March 1, 1913; he knew there was a demand for that indirect lighting fixture, brought about by reason of the invention and marketing of a certain new Tungsten light; he knew the prevailing rates under which rights to manufacture were offered to manufacturers for patented articles; certainly if a hypothetical question can be put to him stating the facts which we believe our testimony in the case has proven, that he is qualified to give his opinion as to the value of that property, based on the facts which are presented to him in the hypothetical question.

(By the MEMBER.)

Q. Do you know what lights or fixtures of the character of the Briterlite were being manufactured in 1912 and 1913?

A. Yes, I knew of the Brascolite; I knew of the Phoenix light, and I knew also of the Perfect Light, which was made in Seattle, all of the same order, having a reflecting surface back of them, and since then there has been any number of units, in the last few years, developed along those lines.

Q. Do you know of any others that were being manufactured in 1912 and 1913?

A. Those three are the only ones I know at that time.

Q. Is it possible there were some other manufacturers that you did not know about?

A. There might have been.

Q. That there were others manufactured that you did not know about?

A. Yes, there might have been.

Q. You would not want to say that those were the only kind being manufactured in 1912 and 1913?

A. No.

Mr. KOSTER.—Those assumptions which we have made in the hypothetical question, if your Honor please, we feel were supported by testimony that has gone before; we submit that we should be entitled to use the facts which we believe have been proven by our testimony in the hypothetical question which we are presenting to this witness who is qualified to answer the question.

The MEMBER.—I will ask you to re-state your question now, Mr. Koster.

Mr. KOSTER.—May I have it re-read, if the Board please, by the Reporter?

(Thereupon the Reporter read the hypothetical question propounded to the witness by Mr. Koster.)

The MEMBER.—Is that the question you want answered?

Mr. KOSTER.—That is the question.

The MEMBER.—Do you understand the question?

The WITNESS.—I do.

The MEMBER.—I will ask you now, can you answer that question,—I am not asking you to answer it at present; I am asking you to tell me whether you can answer it or not.

The WITNESS.—Yes.

The MEMBER.—Do you know whether or not the Briterlite was superior to the other makes of light that you state were being manufactured in 1912 and 1913, with which you were then familiar?

The WITNESS.—From information which I have had in the last five years, I believe that the Briterlite is of better design than the Brascolite or other lights that I had come in contact with up to that time.

The MEMBER.—You may answer, subject to the objection of counsel for the respondent. Objection sustained. Exception granted and noted. S. J. M.

The WITNESS.—I would say a fair market value of that invention is worth about \$300,000. (By Mr. KOSTER.)

Q. Will you state upon what you base your opinion of that value, Mr. Cooley?

A. I would base that on an estimate of possibly five thousand units in this territory, which would be approximately fifteen thousand units for the Coast, which, under our system of estimating the entire country is ten per cent of the entire country's demand for that class of stuff, and that would give about 150,000 units. From experience that I have had in attempting to market an invention, I find that the prevailing royalty basis is approximately five per cent of the manufacturing cost; the manufacturing cost of one of those units, I would say, the average cost, would be about ten dollars, which would be about fifty cents a unit, at fifty cents a unit, a million and a half units would figure around \$750,000. In my estimation, due to the fact that you have ten years of practical life of the patent,—the other seven you might be getting started and competition may come up, but by discounting that fifty per cent it still brings it down to \$375,000; that is how I roughly estimate the market value of the invention.

(By the MEMBER.)

Q. As of March 1, 1913?

A. Yes, because that was the time when it was very valuable; it is not now, because of all of the competition.

(Tr. pp. 79 to 86.)

WHEREFORE, for the many manifest errors committed by the Board, the petitioner through her attorneys, prays that the final order of said Board of Tax Appeals be reversed; and for such other and further relief as to the Court may seem meet and proper.

Dated, October 1, 1932.

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[Endorsed]: Filed Nov. 7, 1932. Paul P.
O'Brien, Clerk.